United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2290

To be argued by
ALAN DERSHOWITZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2290

UNITED STATES OF AMERICA,

Appellee,

—against—

EDMUND ROSNER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT EDMUND ROSNER

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PRELIMINARY STATEMENT

In early May of 1974 a story in The New York Times publicly revealed for the first time that Robert Leuci -- the government's key undercover agent in its investigation of corruption in the criminal justice system -- admitted committing massive perjury at the trial of Edmund Rosner and that he himself had been a thoroughly corrupt policeman involved in hundreds upon hundreds of serious crimes. The proceedings below, on Rosner's motion for a new trial, have disclosed an extremely sordid episode in the administration of justice in the federal courts. The trial court found that prior to Rosner's trial, two Assistant United States Attorneys who "were deeply involved in the preparation of the Rosner case," were aware of criminal activities that Leuci had engaged in and denied at trial; that a memorandum containing Leuci's admissions of one of these crimes was not disclosed by the government, even though it concededly constituted 3500 material; that a tape recording in which "Leuci demonstrates a familiarity" with illegal narcotics dealings was possessed and heard by an Assistant United States Attorney before trial but was not disclosed and "only came to light during the final days of the instant hearing, when Leuci made an inadvertent reference to it."

The trial court also found that after Rosner's conviction and while there was pending a new trial motion in which Rosner was attempting to establish that Leuci had lied when he denied any involvement in narcotics crimes, the government deliberately failed to disclose the fact that a registered government informant had given the government detailed information about Leuci's deep

involvement in narcotics crimes. The trial court found that "the prosecutors could not help but recognize the similarity between Lawrence's (the registered informant's) charges and those contained in the affidavits submitted in support of Rosner's motion; they should thus have realized that the information supplied by Lawrence might have been of some assistance to Rosner in substantiating the contentions advanced in the motion."

Finally, the record below establishes that the United States Attorney's office deliberately withheld from the Supreme Court information establishing that various federal law enforcement officials -- including two Assistant United States Attorneys -- had pre-trial knowledge of crime about which Leuci perjured himself at Rosner's trial.

Despite this record of flagrant perjury, government knowledge and deliberate suppression (before, during and after the trial), the lower court denied Rosner's motion for a new trial, on the ground that all these errors were "harmless." The trial judge said that he would have denied the motion even if the United States Attorney's office had been aware of the full extent of Leuci's perjury,* since he believed that "the jury's verdict could not possibly have been affected." The trial court acknowledged that Leuci's perjury "would be a matter of serious concern if his credibility had been crucial to the jury's

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* "Even if Leuci's perjury is fully attributable to the government ...I would be compelled to deny this branch of the motion." Slip Op. at 20.

determinations," but agreed with the government's contention that the verdict "depended not a whit on any of Leuci's uncorroborated testimony."

A careful analysis of the record reveals, however, that Leuci's credibility was crucial to the government's case against Rosner, and that if Leuci's testimony had been disbelieved -- as it probably would have been had his massive perjury and criminality been exposed --the government's entire case would have rested on ambiguous tapes of some, but not the crucial, conversations between Rosner and Leuci.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

v. 74 - 2290

EDMUND ROSNER,

Appellant.

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BRIEF FOR THE APPELLANT

INTRODUCTION

The basic facts giving rise to this appeal are not in dispute. They fall neatly into three periods, distinct in time and legal relevance: (1) the period before Rosner's trial; (2) the period between Rosner's conviction and first appeal; and (3) the period since the filing of Rosner's petition for certiorari. Accordingly, this brief will be divided into three major sections corresponding to these three periods. As a result of the extensive governmental misconduct revealed in the record, the brief originally submitted on this appeal was 141 pages long. This Court, however, denied appellant's motion to file that brief, and required him to shorten it to 90 pages. This ruling required appellant to omit or considerably shorten various important arguments, facts and case analyses.[1] The original brief is on file in the Clerk's Office in the event that this Court decides to refer to it.

STATEMENT OF FACTS

On December 5, 1972, Edmund Rosner was convicted of

[1] Appellant was also required to omit much of the documentation and footnote explanations supporting the text. Full documentation appears in the original brief on file in the Clerk's Office.

conspiracy, obstruction of justice and three counts of bribery. Rosner's conviction was affirmed by this Court, United States v. Rosner, 485 F.2d 1213 (1973), and the Supreme Court denied certiorari, ___U.S. ___ (June 10, 1974) specifically without prejudice to consideration of the instant proceeding.

Judge Bauman recognized that:

> The government's case was based principally on the testimony of Leuci, and on the tape recordings which he made of several conversations between himself and the defendants. The other government (witnesses') testimony was clearly ancillary and introduced for corroboration of Leuci(Slip Op., p. 3).

Indeed, without Leuci's testimony, the government's case would have rested on the tape recordings alone. Leuci had not, however, tape recorded all of his conversations with Rosner during the period of the alleged bribery. There were certain conversations which were crucial to the government's case -- and to the rebuttal of Rosner's defense of entrapment -- which were presented to the jury solely through Leuci's testimony. Consequently, as Judge Bauman noted: "All sides were aware, prior to and during the trial, that Leuci's credibility was a matter of no small significance." Id.

DEFENSE REQUESTS FOR LEUCI INFORMATION

Judge Bauman correctly recognized that Leuci's credibility was the central focus of the defense strategy during the pre-trial phase as well as during the trial itself. As he found,

"The defense therefore made a concerted effort, beginning with its pretrial motions, to locate information damaging to Leuci." Id.[2]

Rosner's trial attorneys candidly informed the government pre-trial that they intended to focus their defense on impeaching Leuci:

> This prosecution will in large part be a one-man show, Robert Leuci against Edmund Rosner and his co-defendants. There is no question but that the issue of Leuci's credibility will be strongly contested and will become perhaps the central issue that will be litigated (Affidavit of Ivan S. Fisher, filed in support of discovery motion, p. 5).

At the hearing on Rosner's discovery motions, Assistant U.S. Attorney Sagor acknowledged in open court his awareness of the defense strategy:

> I think Mr. Kreiger's (Rosner's lawyer) interest really is, and there is nothing wrong with it. . . to dig up dirt to impeach Detective Leuci's credibility (August 23, 1972 Hearing, Tr. 22; see also H. Tr. 26).

Sagor vigorously opposed the discovery of government files on Leuci and the defense motion was denied. The government did, however, recognize an obligation to disclose some material regarding Leuci's criminal past. By letter dated November 10, 1972, Assistant U.S. Attorney Morvillo informed defense counsel that Leuci had previously made admissions to certain government agents regarding "past criminal conduct on his part" and invited defense counsel to conduct interviews about these admissions. On

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[2] For example, on July 21, 1972, the defense filed pre-trial motions for discovery, seeking, inter alia, disclosure of all information contained in the City Police Department files on Leuci pertaining to any complaints of misconduct pending against Leuci "of which the government is aware or of which the government could become aware by the exercise of due diligence" (Rosner's Notice of Motion, July 21, 1972, at p. 6, emphasis added).

November 15 and 16, Rosner's attorneys interviewed Leuci, Special Assistant U.S. Attorney Scoppetta, and Federal Agent Carros, in the presence of one of the government trial attorneys, Sagor. Assistant U.S. Attorney Shaw received a copy of the letter inviting the interviews.

The admissions disclosed at the interviews had originally been made on February 1971 during three lengthy conversations between Leuci and Scoppetta, then attorney for the Knapp Commission (H. Tr. 341).[3] The purpose of the conversations had been to persuade Leuci to become an undercover agent in the joint state-federal investigations into corruption in the criminal justice system (H. Tr. 10). Other government agents, including Assistant U.S. Attorney Shaw and Agent Carros, were present during portions of the conversation, or learned of Leuci's admissions shortly thereafter.

These admissions of "past criminal conduct" were -- in light of what we now know -- trivial. They involved several incidents in 1966 and 1967 in which Leuci had acted as an intermediary between persons under investigation by the Narcotics

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[3] "H. Tr." refers to the transcript of the hearing on the instant new trial motion.

Division of the New York City Police Department and policemen who sought to "shake them down."[4]

Rosner's attorneys, not believing that Leuci's criminal past had been limited to these four acts, pressed Leuci and other government officials for further information regarding Leuci's crimes, particularly crimes involving narcotics transactions.[5]

But efforts at pre-trial discovery were wholly unavailing. The interviews of Leuci and other government agents on November 15 and 16 produced blanket denials of Leuci's involvement

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[4] Scoppetta had tape recorded Leuci's admissions, but he had promised Leuci that the tapes would remain Leuci's personal property (H. Tr. 345). Scoppetta and Shaw had later discussed the necessity of preserving the tapes to turn over to defense counsel as 3500 material in the event Leuci were required to testify as a government witness in corruption cases (H. Tr. 453-4). Nevertheless, on June 21, 1971, at about the time that Leuci and Scoppetta began to work for the federal government, Scoppetta, with Shaw's knowledge and consent (H. Tr. 453) released the tapes to Leuci -- and Leuci destroyed them (H. Tr. 347). In fact, Leuci had warned Shaw and Scoppetta when they returned the tapes to him that he would destroy them (H. Tr. 41). Leuci has since testified that he was never asked whether he would have objected to a transcript being made of the tapes to preserve a record of what he had told Scoppetta (H. Tr. 39). No transcript was made (H. Tr. 454) but before relinquishing the tapes Scoppetta did prepare a brief memo of the recorded conversations stating in one sentence that Leuci had participated in "some" sale-of-information situations. Although Shaw had advised Scoppetta to make a detailed memo of Leuci's admissions (H. Tr. 454, 456), the Scoppetta memo describing the entire three days of conversation was two double-spaced pages in length, and contained only vague generalizations. This memo was later turned over to Rosner's attorneys as 3500 material, but was totally worthless to the defense.

[5] By letter to Morvillo, dated November 14, 1972, they requested that the United States Attorney's office make appropriate inquiries of the local Police Department and of D.A.'s offices regarding Leuci's involvement in narcotics crimes. On the same day Rosner's attorneys served subpoenas on Police Department's Internal Affairs Division, local D.A.'s offices, seeking production of all written material relating to Leuci's criminal conduct. And at the November 16 interview of Leuci, Rosner's attorneys questioned Leuci specifically about narcotics crimes.

in any illegal narcotics transactions, and Morvillo reiterated in writing this denial. At the trial, government attorneys vigorously opposed the subpoenas of government records, including those in the possession of the United States Attorney's office and the subpoenas were consequently quashed (See T. Tr. 14-14, 34, 41, 203, 338-339).[6]

PRE-TRIAL SUPPRESSION

Only now, as a result of the evidence developed in the course of the hearing on Rosner's third new trial motion, is it clear that the defense's dissatisfaction with the government's disclosure both pre- and during trial was, to say the least, warranted. Judge Bauman found that, in addition to Leuci's admissions to Scoppetta, the government possessed -- pre-trial -- the following knowledge and information regarding Leuci's criminal past:[7]

1) The judge found that on July 13, 1972 -- just one week before Rosner's pre-trial discovery motions were filed,

> Leuci was interviewed in the offices of the United States Attorney by two agents of the Drug Enforcement Administration (DEA), Robert Goe and Joseph Gately. He admitted to them that in 1964 or 1965 he had participated in a warrantless search for drugs along with three other government agents. No narcotics were found, but the four men did steal $200 from the premises which they divided among themselves equally. This was dutifully memorialized in what has come to be known as the "Goe memorandum" (Slip Op. p. 6).

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[6] "Tr." refers to the transcript of Rosner's trial.

[7] According to Leuci's admissions during the instant proceeding, it is also now established that many of the allegations against Leuci contained in the subpoenaed police department files were, in fact, true.

This crime was of a totally different character from those Leuci admitted at the Rosner trial: it was an illegal breaking and entry, grand larceny and its victim gained nothing. As the judge found, "The Goe memorandum, which the government concedes to have been '3500 material,' was not turned over to the defense prior to trial." Id.

2) The judge further found that

> Leuci had made a similar admission in early 1971 to another DEA agent, Andrew Tartaglino, at the apartment of Edward M. Shaw, then an Assistant United States Attorney. Shaw learned of the incident shortly thereafter. Id.

Indeed, the government conceded that Shaw was aware of the incident as early as Spring 1971 (H. Tr. 462) and that Shaw's knowledge came directly from Leuci (H. Tr. 458). Moreover, Shaw testified that he discussed this crime with Special Assistant United States Attorney Scoppetta (H. Tr. 459).

The judge recognized Shaw's and Scoppetta's intimate relation to the trial:

> Shaw and Scoppetta were deeply involved in the preparation of the Rosner case. The two men were given primary responsibility for gathering and disclosing to the defense all "3500 material." Shaw also presented the case to the grand jury and, although by the time of trial he had left the United States Attorney's office to become head of the Southern District's Strike Force, he was the government's first witness and by his own admission followed the trial closely. Id. at 10

However, neither Shaw nor Scoppetta disclosed their personal knowledge of the Goe information to the defense.

3) The judge also found that evidence of still another category of crime committed by Leuci -- illegal narcotics transactions --

was within the government's possession long before the trial. That evidence was developed as follows:

> In March (1971) Scoppetta (then an attorney with the Knapp Commission) ordered Leuci to investigate the involvement of Richard Lawrence, previously identified as an informant of Leuci's, in a homicide in the Bronx. As a result Leuci tape recorded a conversation with Lawrence. The conversation yielded no information about the homicide; it did suggest, however, that both Leuci and Lawrence had participated in illegal seizures of narcotics following arrests, and that Lawrence had retained some of the narcotics ("packages") to help meet a continued need for money. Id. at 5.

Although Judge Bauman noted that the conversation, whose most significant passage is set out in the margin,[8] is ambiguous,

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[8] "Leuci: You know the story with you is always the same story. Now, let me explain something. The easiest way for you to get a package is to make a case, right?

Lawrence: Make a case?

Leuci: Yeah. Am I right or wrong?

Lawrence: No, no, no. How the hell am I gonna ... Here the hell is that gonna work?

Leuci: Oh, come on. What are you talkin' about?

Lawrence: What do you mean so ... so ... what do you ... what do you mean? How the hell is ... how is that gonna work?

Leuci: If you make a case.

Lawrence: Yeah.

Leuci: And there's a seizure.

Lawrence: Yeah.

Leuci: You get a piece of the package, right?

Lawrence: No. Not necessarily. How ... how do you figure that?

Leuci: Have we ever made a case where you didn't get a piece of the package?

(footnote continued on following page)

he recognized that "There is no question. . .but that during the course of (the taped conversation) Leuci demonstrates a familiarity with procedures whereby Lawrence would obtain 'packages' of heroin resulting from arrests." Id. The tape thus not only contains admissions of crime by Leuci, but also it is in itself direct evidence that Leuci participated in a conspiracy to obtain drugs

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(cont'd)

Lawrence: Have we ever made a case that I didn't get a piece of the package? Oh, man, I don't know what the hell you talkin' about. I don't know what you talkin' about. Have we ever made a case that I didn't get a piece of the pack...? Hell, we've made a whole lot of cases that I didn't get a piece of the package. I don't know what the hell you talkin' about. Shit! That...that...that if that was the case, I'd 've been straight now. But...have we made a case and I get a piece of the package....

Leuci: No. I'm not talkin'...you know.

Lawrence: I'd be sittin' on top of the world.

Leuci: Yeah, right. But we really never made, you know, like when we were fallin' over fuckin' packages.

Lawrence: Right.

Leuci: You know, I agree with you there.

Lawrence: Right.

Leuci: But, I...I would think that the easiest way to go up and you know, you make it understood before you make the case. We're gonna do something. Whoever you've workin' with. With whoever you've workin' with. So it takes you four days to make...whatever bullshit case...like you to get a guy with a eighth half, whatever.

Leuci: It is. (1 secs/unintell.) and you get your hands on something...three owners, four owners, and you're home free. Right.

Lawrence: No man. You can't do things like that.

Leuci: Don't you tell me you can't do things like that.

Lawrence: You can't do things like that.

Leuci: Well. I don't know.

illegally.[9] The judge found that "Leuci told Scoppetta of this conversation and Scoppetta subsequently listened to the tape, which he took with him when he joined the staff of the United States Attorney." Id. at 5-6. Despite Scoppetta's deep involvement in the preparation of the Rosner case and his "primary responsibility for gathering and disclosing to the defense all '3500 material' " (Id. at 10), as the judge noted, "The tape was. . .not disclosed to the defense prior to the trial, and only came to light during the final days of the instant hearing, when Leuci made an inadvertent reference to it."[10]

LEUCI'S TRIAL TESTIMONY

In what Judge Bauman characterized as "an effort to minimize the impact of. . .such information (which would be "damaging to Leuci") , the government prosecutors elicited from Leuci at the very outset of his trial testimony admissions of prior criminal conduct" (Slip Op. p. 3). Not surprisingly, Leuci's admissions were limited to the very same four crimes which had been disclosed to defense counsel in advance (Tr. Tr. 163-164A).[11] Leuci portrayed himself as a man who had protected the defenseless subjects of investigations from over-reaching by

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[9] It is conceded by the government that Leuci was never authorized by his government superiors to make any such suggestion to Lawrence (H. Tr. 986-987).

[10] The judge found that the tape had "remained in a locked cabinet in the U.S. Attorney's Office" (Id. at 13) but he decided -- erroneously, the defendant contends -- that the "peculiar and ambiguous" nature of the tape excused the government from any obligation to disclose it to the defense.

[11] Judge Bauman's finding (at p. 3) that Leuci testified to "four such acts...between 1966 and 1968" is not quite accurate: Leuci was explicit at trial that mid-1967 was the date of his most recent criminal act.

other -- corrupt -- policemen. He testified that the persons who were under investigation "felt (he, Leuci) was sort of a breath of fresh air (whom)they could count on. . .to sit at a mediation of that sort of thing and give them a fair shake" (T. Tr. 363). The total sum of money which Leuci admitted receiving for his role of intermediary was approximately $5-6,000.

Although Rosner's attorneys vigorously attempted to elicit from Leuci further admissions of crimes, particularly narcotics crimes, they were totally unsuccessful. Leuci emphatically denied such involvement and insisted that the "last time" he had committed any illegal act was mid-1967 (T. Tr. 353, 380, 384). As the judge noted "Leuci maintained under persistent cross-examination that these (four sale-of-information episodes) were the only criminal acts in which he had ever participated" (Slip Op. p. 4).

The jury was thus presented with the picture of a policeman who was basically fair and honest, who appeared to have exercised a restraining influence on other over-reaching corrupt policemen, and whose frank admissions of past misconduct cast a light of truth over all his testimony. In his summation to the jury, Assistant U.S. Attorney Morvillo repeatedly pointed to this picture of an honest Leuci. For example, he stated:

> Not once, not once did Detective Leuci get caught in any lie, because he didn't lie. Mr. Kreiger -- you have all seen him -- is an expert. He is one of the best there is. Yet he couldn't shake Detective Leuci with regard to his testimony. There was no inconsistency in Detective Leuci's testimony (T. Tr. 1333).[12]

[12] Further examples of the government's emphasis on Leuci's credibility are described below, at pp. 34-38.

LEUCI'S CURRENTLY ADMITTED CRIMES

As the judge noted, "The crimes to which he has now confessed are numerous and go far beyond his admissions at the Rosner trial" (Slip Op. p. 4). Leuci was not, as he was portrayed to the jury, a basically honest cop who had committed four acts of misconduct during the course of his law enforcement career. Rather, he was a major criminal figure who had for years, while working as a policeman engaged daily in committing a vast array of serious crimes.[13]

(1) Appropriation of Seized Monies and Payoffs ("Scores")

Judge Bauman found that "On approximately fifteen occasions, Leuci shared with fellow police officers money seized in narcotics raids," receiving (Slip Op. p. 4) as much as $154,800, perhaps as much as $234,800.

(2) Narcotics Distribution: Giving, Obtaining and Failing to Turn In, etc.

The judge found that "Over a period of perhaps three years, (Leuci) distributed small quantities of heroin to informants." Id. at 4. Leuci named at least ten informants to whom he gave narcotics during that period, in amounts ranging from two to ten "bags" of heroin at a time. Some of these distributions were made to informants who were in the business of selling drugs; others to informants who may have sold drugs. Judge Bauman found that "in exchange for letting (several informants) continue to sell narcotics," Leuci "occasionally" took heroin from them. Id. at 4.

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[13] Based on his own admissions, Leuci committed hundreds upon hundreds of crimes, involving perhaps $200,000 in illegally obtained money, and exposing him -- theoretically -- to the risk of hundreds of years of imprisonment.

(3) Pay-Offs from Informants

Judge Bauman also found that Leuci "took money. . . from informants in exchange for letting them continue to sell narcotics." Id. The total amount of money involved in these pay-offs over a five-year period ranged from $43,200 to $144,000.[14]

(4) Sale of Police Investigation Information

Leuci, as the judge found, "confessed to acting in (an) intermediary role on occasions other than those about which he testified at the Rosner trial" (Slip Op., note 7). Over a period of three to five years, Leuci also engaged in numerous direct sales of investigative information and advice to members of organized crime, for which he received as much as $15,000.

(5) Illegal Electronic Surveillance

The judge found that Leuci "participated in illegal electronic surveillance on several occasions"; Leuci admitted to four such crimes during the instant proceedings.

(6) Illegal Payoffs to and from Attorneys

Leuci "accepted sums of money from lawyers and on one occasion, participated in the paying of a bribe to an Assistant District Attorney." Id.

(7) Pay-Offs to Superior Officers

Leuci admitted to over eleven separate incidents of

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[14] Assuming three informants over six years with 24 payoffs per year average quantities of $100, Leuci was criminally involved in collections of $43,200; if we assume quantities of $200, the amount is doubled, or $86,400. Assuming payoffs from five informants the total for Leuci's illegal activity in this area is between $72,000 (assuming $100 quantities) and $144,000 (assuming $200 quantities). The fact that the total sums received were sometimes shared does not legally reduce the level of Leuci's criminal involvement.

"(making) payments of money to his superior officers in the Police Department." Id.

(8) False Testimony and Lying

Judge Bauman concluded his "enumeration" of Leuci's crimes by stating: "And finally, it is almost supererogatory to add that he committed perjury at the Rosner trial, at a trial in the New York state courts, and in numerous interviews with government prosecutors and defense lawyers" (Slip. Op. p. 4). He also lied on search warrant applications. It is impossible to total Leuci's admitted lies, but the record of this case discloses at least 11 separate occasions, and a course of persistent lying to officials over a period of at least four years. Indeed, Leuci admitted that he deliberately lied to Rosner's defense attorneys, in the presence of the prosecutors and his own attorney, just one week before the hearing on this new trial motion (H.T.R. 144), and there is reason to suspect that Leuci has committed numerous additional crimes that he also denied at the hearing.

ARGUMENT

A. LEUCI'S PERJURY IN THIS CASE ENTITLES ROSNER TO A NEW TRIAL

1.) The Government's Knowing Use of Leuci's Perjurious Testimony Warrants a New Trial

The law is settled that knowing use of perjurious testimony by the government requires a reversal and a new trial, even where the testimony concerns only credibility and not the facts of the crime at issue. Giglio v. United States, 405 U.S. 150 (1072); Napue v. Illinois, 360 U.S. 264 (1959).

On the undisputed facts of this case the federal government must be held to have had knowledge that Leuci was committing perjury on the witness stand. There are two independent bases which require this conclusion:

(a) The record below establishes that various federal agents -- including two Assistant United States Attorneys intimately involved with the Rosner case -- knew, before trial, of specific admissions by Leuci of crimes which Leuci perjuriously denied at the trial. One was that described in the Goe memorandum. As described at pp.6-7, supra, Leuci had admitted his participation in this crime first to - federal agent Andrew Tartaglino, and then, one week before the defense filed its pre-trial discovery motion, to federal agents Robert Goe and Joseph Gately; moreover, he had admitted it to Assistant U.S. Attorney Edward Shaw who had then discussed the matter with Special Assistant U.S. Attorney Scoppetta.[15]

Yet, despite their knowledge of the Goe crime, no government agent -- including the attorneys -- corrected Leuci's false testimony. Although neither Shaw nor Scoppetta were technically the trial lawyers in the case, the law is clear that, as government attorneys primarily responsible for investigating

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[15] Shaw testified that although he "clearly assumed" that Leuci had participated in the Goe incident he had made a "conscious judgment not to cross examine or inquire into Leuci's possible prior misdeeds" in order not to damage his potential working relationship with Leuci (H. Tr. 459). While such restraint may be an effective means of establishing a working relationship, it is wholly inappropriate conduct for a government attorney whose duty it is to elicit the truth. Shaw also testified that he and DEA agent Tartaglino, to whom Leuci had made the same admission somewhat earlier, had discussions about the Goe matter (H. Tr. 459).

the case, their failure to correct the false testimony is attributable to the prosecution. Giglio v. United States, supra; Santobello v. New York, 404 U.S. 257 (1971). The government's contrary argument below was rejected by the judge below:

> (T)he defendant is surely correct in arguing that the acts in question are attributable to the government. The fact that neither Scoppetta nor Shaw directly participated in the Rosner trial is immaterial; it is now settled law that the misdeeds of one member of a prosecutor's office are attributable to the prosecution as a whole. (citations omitted) But my finding need not be based on this abstract proposition alone, for I must conclude that both Shaw and Scoppetta were deeply involved in the preparation of the Rosner case (Slip Op. at 9-10).

Shaw and Scoppetta knew all the facts necessary to conclude that Leuci committed perjury. Both were aware of the Goe crime, and both were personally aware, pre-trial, of the extent of disclosure of past crimes that Leuci was preparing to make at trial.[16]

The failure of Shaw and Scoppetta to correct Leuci's omission of the Goe crime cannot be justified on the ground that the Goe crime was de minimis because it involved a relatively small amount of money compared to the amounts Leuci received in the four crimes admitted at trial. This argument reflects extreme moral insensitivity. A federal judge recently sentenced John Ehrlichman to up to five years imprisonment for his responsibility in a burglary in which nothing was taken. For the

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[16] Scoppetta participated in the November 15 interviews of Leuci by Rosner's attorneys (H. Tr. 985), and Shaw received a copy of the letter inviting the interview. Moreover, Shaw testified that he discussed with Leuci, on the eve of the trial, the necessity for Leuci to be "candid" in regard to disclosing his own prior misconduct -- and Shaw admitted following the trial closely (H. Tr. 463-465).

government -- and the lower court -- to focus on the fortuity that only $200 was found is to neglect the crucial aspect of the crime: a government official entrusted with the power to prevent and solve crime, abused this position of trust to commit a venal and personally-enriching crime. It is clear that a lay jury would regard the kind of crime admitted to in the Goe memorandum as among the most serious a policeman could possibly commit -- and one far more se ous than the crimes Leuci admitted to at the Rosner trial. And it was for the jury -- not the government or even this Court -- to decide what weight to give to Leuci's involvement in that crime, and his failure to acknowledge it on the witness stand.

Another previously known crime which Leuci totally omitted -- indeed flatly denied -- at the trial involved illegal narcotics dealings. In March 1971, Scoppetta came into possession of the tape of Leuci discussing his own illegal narcotics dealings with Lawrence, described and quoted, supra at pp. 8-10 .

Despite the fact that "Scoppetta subsequently listened to the tape" (Id. at 5), and also discussed it with Leuci (H. Tr. 981), Scoppetta failed to correct Leuci when he later denied, both during the pre-trial interview and at trial, that he had ever engaged in narcotics crimes.

On this record there can be no question that the government did possess actual knowledge, pre-trial, of facts establishing Leuci's perjury at trial. Indeed, this Court has indicated that suspicion by the government that one of its principal witnesses has committed perjury is sufficient to warrant a new trial. United States v. DeSapio, 456 F.2d 644, n. 2 (2d Cir. 1972).

(b) Quite apart from what Assistant United States Attorneys and other government agents knew, pre-trial, about Leuci's past crimes, Leuci himself knew that he committed perjury at the Rosner trial. As the trial court observed: "Leuci. . . knew exactly how flagrant his perjury was" Id. at 16. It is undisputed that in this case Leuci was, for all intents and purposes, an agent of the federal government (See H. Tr. 239). As the lower court found: "Leuci was of course a part of the prosecution team in that although a New York City policeman, he was working full time under the supervision of the United States Attorney's Office " Id. at 18. The law is well established that when the perjuror himself is a law enforcement official who is an integral member of the prosecution team, knowledge of the perjury must be imputed to the government. In Pyle v. Kansas, 317 U.S. 213 (1942), the Supreme Court held that a conviction based on perjured testimony violated due process even though the

> prosecuting officer was in no wise a party to or cognizant of the perjured testimony given by certain witnesses of the State of Kansas, or of the fact that the law enforcement officers had taken steps to procure false testimony favorable to the prosecution.[17]

While recognizing the line of cases deriving from Pyle the District Court nevertheless distinguished the situation in the case at bar. The court below attempted to draw an analytical line between a policeman "actively engaged in investigating and preparing. . .cases. . .for trial" with functions "ancillary to,

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[17] In Curran v. State of Delaware, 259 F.2d 707 (3rd Cir. 1958) cert. denied, 358 U.S. 948, where perjury by a police detective tended to shift the balance of credibility in favor of the police, the court held that the detective's knowing perjury denied the defendants due process.

and supportive of, the prosecutors"(such as the police in the cases cited below) and a policeman whose status as such was only "incidental" (such as Leuci) (Slip Op. p. 16).

This distinction, which is inconsistent with the facts of the line of cases cited,[18] cannot withstand analysis. The District Court's artificial categorization absolves the prosecution of responsibility for perjury at trial, while holding it accountable for testimony relating to "investigation." Surely the conduct of the actual trial should present a more compelling case for prosecutorial responsibility than should pre-trial fact-gathering, which is often undertaken without prosecutorial supervision. Had Leuci been an Assistant United States Attorney and performed precisely as he did here, would the government not be charged with his perjury because his function was merely as a "witness?"

Moreover, even if the existence of the District Court's distinction is accepted, surely Leuci fits as comfortably under the "prosecutorial" as the "witness" rubric. The District Court erroneously states that Leuci "did not, obviously, participate in the investigation of this case or in its preparation for trial except insofar as he was a witness" (Slip Op. at 16). But Leuci was a paid government agent -- a participant in

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[18] In Pyle, for example, there is no recitation whatsoever of the particular "prosecutorial" or "incidental" status of the "state authorities" who obtained a conviction with perjured testimony. In fact, Pyle does not even identify those "authorities" as policemen. The District Court did not cite any cases in which a police officer -- let alone an undercover agent who was involved in multiple investigations being "conducted" (Slip Op. p. 2) by the prosecutor's office -- was considered merely a "witness" and, thus, outside the scope of Pyle's prohibition on "state authorities" obtaining convictions through perjury or suppression of evidence.

"investigations conducted by the United States Attorney's Office." Id. at 2. Leuci's failure to disclose his criminal past effectively prevented the prosecution from fulfilling its pre-trial "3500 material" obligation. Leuci had a clear role in the development of such material -- and, in fact, in its destruction. According to the District Court's own theory, had Leuci deliberately withheld information of someone else's perjury, the principle of Pyle, Barbee, et al., would require reversal, Id. at 18; it is simply absurd to distinguish this case on the ground that Leuci deliberately withheld information about his own perjury.

2.) Regardless of the Government's Knowledge, Leuci's Perjury Warrants a New Trial

Regardless of the government's knowledge at the time of the Rosner trial, and simply because Leuci's credibility is now totally demolished, Rosner is entitled to a new trial under the principle of Mesarosh v. United States, 352 U.S. 1 (1956). In Mesarosh, the Supreme Court found that the credibility of Mazei, one of seven government witnesses at trial had been "wholly discredited" by the fact that he had testified in a bizarre and non-credible fashion in several proceedings that followed the petitioner's trial. Although the government did not concede that Mazzei had committed perjury at the trial in question, the Supreme Court concluded that in light of the conceded post-trial deterioration of Mazzei's credibility the "conviction is tainted, and there can be no other just result than to accord petitioners a new trial."

The instant case presents a far stronger case for reversal than did Mesarosh. Here, as in Mesarosh, the witness was

an undercover agent for the government for a period of years. But here, the witness was not merely "a paid informer" (352 U.S. at 11), he was a regular employee of the New York City Police Department working as a full-time agent on his undercover assignment for the federal government. Here too, as in Mesarosh, the witness testified as a government witness in his capacity as a government employee and agent. And here too "it is the government which now questions the credibility of its own witness. . . ." (352 U.S. supra at 11). But here the government does more than question; it has indeed conceded that the witness testified falsely under oath. Here, unlike in Mesarosh, the witness, Leuci, was not merely one of seven government witnesses; he was the only significant witness. Without him there would have been no case.[19]

Here, unlike in Mesarosh, the government has acknowledged that its key witness perjured himself at the trial in question as well as in other related cases, not merely in subsequent proceedings. And here, unlike in Mesarosh, the defendant had repeatedly requested the government to disclose all information in government files relating to the witness' criminality.

The lower court attempted to distinguish Mesarosh on the ground that Leuci's perjury "merely impeaches the credibility of a government witness. . . ." (Slip Op. at note 18). But Leuci's admissions of crime are not merely impeaching. They go directly

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[19] Indeed, at the trial the government emphasized to the jury that a guilty verdict would rest on Leuci's credibility and on the absence of a motive to testify falsely against Rosner (see, e.g., T. Tr. pp. 1299, 1332-1333), and the government acknowledged that evidence that Leuci had committed more crimes than he had admitted would be "derogatory of the government's case and inconsistent with the detective's testimony" (Tr. p. 1469).

to his motive to make a successful case against Rosner: Leuci's continued value to the government was his best guarantee against eventual prosecution for his numerous crimes. Evidence which is probative of a special motive to lie or fabricate a case against a defendant is never merely impeaching. It "is admissible because it bears directly on the issue of the defendant's guilt," United States v. Kinnard, 465 F.2d 566, 573-74 (D.C. Cir. 1972) (Emphasis added); Davis v. Alaska, ___U.S.___, 94 S.Ct. 1105 (1974); United States v Padgent, 432 F.2d 701 (2d Cir. 1970); United States v. Massino, 275 F.2d 129 (2d Cir. 1960); United States v. Lester, 248 F.2d 329 (2d Cir. 1957). This case is not, therefore, distinguishable from Mesarosh.[20]

[20] In Mesarosh, and the cases which follow its lead, the principle is established that courts should grant new trials where the jury's verdict is tainted by perjury. The exercise of the power to grant new trials is thus not limited to situations involving violations of a constitutional dimension. 8 Moore Federal Practice, ¶33.06(1), at 33, 47.

United States v. Gordon, 246 F. Supp. 522 (D.D.C. 1974) presents an example of the Court's power to grant a new trial on the basis of newly discovered evidence that is merely cumulative and impeaching, despite the complete absence in that case of knowing use of perjured testimony. Gordon, like the instant case, involved a discrepancy between a government witness' trial testimony regarding his own criminal past and the later discovered truth about his past. The chief prosecution witness in Gordon "was portrayed before the jury as a man unblemished by a criminal record." Id. at 525. Post-trial investigation by the defense disclosed that the witness had in fact been convicted one time of a crime, petit larceny. The court found that the witness had not technically perjured himself at trial by failing to disclose the conviction; and the court noted that the defendant himself had a prior criminal record so that his own credibility was far from impeccable. Nonetheless the court held that evidence of the government witness' conviction is "of a very serious nature" and is "of a character that would raise a reasonable doubt," especially in light of the one-on-one testimonial conflict between the witness and the defendant. Following Mesarosh, and exercising its power to grant a new trial, the court in Gordon held that "the ordinary rule" --

(footnote continued on next page)

B. THE PRE-TRIAL SUPPRESSION OF EVIDENCE ESTABLISHING LEUCI'S CRIMINAL PAST ENTITLES ROSNER TO A NEW TRIAL

United States v. Kahn, 472 F.2d 272, 287 (2d Cir. 1973) specifies the standard of prejudice applicable to both deliberate and negligent suppression cases:

> If it can be shown that the government deliberately suppressed the evidence, a new trial is warranted if the evidence is merely material or favorable to the defense.
>
> The same rule applies, even in the absence of intentional suppression, if it appears that the high value of the undisclosed evidence could not have escaped the prosecutor's attention.
>
> In each of these instances of deliberate suppression, the materiality of the evidence to the defendant is measured by the effect of its suppression upon preparation for trial, rather than its predicted effect on the jury's verdict.
>
> If the government's nondisclosure is merely inadvertent, and does not involve evidence whose high value to the defense could not have escaped notice, however, a somewhat stronger burden is put on the defendant. While the movant is still not required to show the probability of a different verdict upon retrial, setting aside a conviction is only called for when there is a "significant chance that this added item, developed by skilled counsel as it would have been could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction."

(cont'd)

that "newly discovered evidence which is merely impeaching is ordinarily insufficient to warrant a new trial" -- did not apply to that case. In the Rosner case, the false portrayal of Leuci before the jury presents a far stronger case for the exercise of the court's power to grant a new trial. Leuci was not an ordinary witness; he stood before the jury as a representative of the government, a man entrusted with the power and authority of a law enforcement official, a fair and honest policeman who, despite deviation in the past, now dedicated his life to the pursuit of justice in the criminal justice system. Without a new trial in this case the verdict will, in the words of People v. Lo Presto, 156 N.W.2d 587 (Mich. 1967): "be forever beclouded by the possibility" -- indeed here the strong probability -- "that the jury unwittingly acted upon false testimony of an undisclosed perjurer."

1.) The government Deliberately Suppressed Knowledge of Leuci's Admissions of Crimes; Since that Information was "material or favorable to the defense" as "measured by the effect of the suppression upon preparation for trial," Rosner is Entitled to a New Trial.

The trial court found that long before trial, United States Attorneys Shaw and Scoppetta knew not only of the crimes which Leuci eventually admitted to at the trial, but Shaw and Scoppetta also knew of Leuci's participation in the burglary and theft later detailed in the Goe memorandum, and Scoppetta was aware that Leuci had engaged in discussion with Lawrence regarding ilegal drug transfers. Failure to disclose such knowledge cannot reasonably be deemed to be "merely inadvertent"; it must be considered "deliberate" in at least two of the three senses in which that term is used in Second Circuit suppression cases.

First, it was deliberate in the sense that the "high value to the defense of (that knowledge) could not have escaped the prosecutor's attention." As the trial court found, for purposes of pre-trial knowledge of Leuci's admission of crime, Shaw and Scoppetta must be deemed the prosecutors in this case. From the time that Leuci began making corruption cases for the federal government, Shaw and Scoppetta were aware that admissions by Leuci of crimes would later be producible to defendants in cases made by Leuci. The two attorneys openly discussed the obligation of the government to preserve evidence of such admissions as 3500 material. Shaw and Scoppetta could not then have failed to realize at the time that Rosner and his attorneys were preparing for trial, that their knowledge of Leuci's criminal admissions was of "high value" to the defense. Having made

disclosures of some knowledge of Leuci's past crimes, the government cannot now argue that the high value to the defense of admissions of additional Leuci crimes -- of a different character -- simply escaped the prosecutor's attention.

In any event, the suppression was "deliberate" "in a second sense of that term": namely, failure "to furnish evidence favorable to the accused upon request." As the trial court recognized, Rosner's attorneys repeatedly made requests for full disclosure of any such information relating to Leuci's criminal past, specifically including information regarding drug crimes. In the face of those pre-trial requests -- which repeatedly "serve(d) the invaluable office of flagging the importance of the evidence for the defense" and thus imposed the "duty to make a careful check" of the government files, United States v. Keogh, 391 F.2d 138, 147 (2d Cir. 1968), -- the government cannot now deny the deliberate nature of the suppression, particularly since the Leuci-Lawrence tape was sitting in "a locked cabinet in the United States Attorney's office at the time" (H. Tr. at 982).

Under the rule of the Second Circuit -- that deliberate suppression requires a new trial when "the evidence is merely material or favorable to the defense. . .(as) measured by the effect of its suppression upon preparation for trial" -- Rosner clearly is entitled to a new trial. The knowledge possessed by Shaw and Scoppetta regarding the Goe crime and the Leuci-Baron relationship would unquestionably have had a major effect on Rosner's trial preparation. That knowledge, standing alone, would have added substantially to the defense arsenal of weapons to attack Leuci's credibility and motive. But more critically, in

defense hands those items of knowledge would have led to other significant impeaching information. First, regarding the Goe crime, it must be assumed that had Shaw and Scoppetta disclosed that crime, the existence of the Goe memorandum itself would have quickly surfaced.[21] That memorandum contained names of others whom Leuci had accused of crime.[22] Possessed of these names, the defense would have questioned the other alleged perpetrators. Such questioning might well have revealed further Leuci "scores." Alternatively, it might have revealed that Leuci had falsely

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[21] When Assistant United States Attorney Elliot Sagor -- under pressure from Rosner's third new trial motion -- finally requested of the DEA that it disgorge its files on Leuci, the Goe memorandum floated to the surface relatively easily: "I (Sagor) renewed my request to him (Mr. Taylor) in March (1974) and I told him I wanted any piece of paper, without characterizing the paper, where Leuci's name was mentioned or where the Baron's name was mentioned and I understood that he asked -- made this request of Mr. Sherman and there came a time when Mr. Sherman's office, either he or someone from his office brought a file to my office which contained, when I looked at parts of the file on April 9, the Goe memorandum." (H. Tr. 590). It must be assumed that other material could have been obtained as easily.

[22] Even without that memorandum itself the defense would have been able to discover the names of those whom Leuci alleged participated with him in that crime simply by asking the federal officials for all information relating to Leuci's admissions -- and, if necessary, by asking Leuci on the witness stand.

accused the other alleged perpetrators -- an action that would have gone directly to the issue of Rosner's guilt or innocence.[23]

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[23] The trial court's refusal to require the government to turn over to the defense the names of those accused by Leuci of the Goe crime was clearly erroneous (H. Tr. 834-835). The government presented absolutely no basis to the court for retaining these names in secrecy. Yet the judge declared:

> It seems to me that I have forbidden all the names to be presented upon the public record previously, and I adhere to that ruling. I adhere to that ruling. (H. Tr. 834).

The defendant's attorney made an offer of proof regarding the "not insignificant use" which trial counsel would have been able to make of these names. The following colloquy details the prejudice suffered by the defense in trial preparation:

> MR. DERSHOWITZ: . . .It would have then been the job of the defense attorneys, . . .to contact and interview each of those witnesses (named in the Goe memorandum) to find out whether they had engaged in other acts of misconduct with Leuci, and so it's very possible, and indeed probable, that the disclosure of the Goe memorandum would have been the opening wedge to the disclosure of eighteen or twenty other so-called "scores."
>
> THE COURT: I understand your proposal. The objection is sustained. . . .I think the record is clear. What you are saying is if you knew the names you would have had additional leads to follow up, and you might have found out more about Mr. Leuci's practices.
>
> MR. DERSHOWITZ: If, in fact, the leads had been borne out, and we would have found them true, we might very well have had additional crimes; if, on the other hand, the agents denied participating in the Goe incidents or other incidents, we might have been able to establish at trial that Leuci would have made false accusations which would have (gone) directly to the guilt or innocence of Mr. Rosner (H. 835-836).

The government has recognized the critical significance of this second possible use of the Goe names. In the Supplemental Memorandum for the United States submitted in opposition to the Rosner Petition for a Writ of Certiorari, the Solicitor General writes, at p. 6, n. 2:

> "This case would be analogous to Mesarosh. . .if it were found that Leuci had repeatedly made false accusations of bribery and obstruction of justice against other persons in other proceedings. There is no suggestion that anything of this sort has occurred."

The other critical evidence possessed by the government pre-trial -- Scoppetta's knowledge of the Leuci-Baron drug relationship and the actual tape of their March 1971 conversation which was admittedly in a cabinet in the United States Attorney's Office[24] -- would also have a major effect on trial preparation. Had this been disclosed to Rosner's lawyers, the whole course of Rosner's trial preparation would have been substantially altered. Disclosure of that tape alone would have led, of course, directly to Richard Lawrence "The Baron" himself. The record of this case leaves no doubt that Lawrence's allegations were a significant factor leading to the full exposure of all Leuci's past crimes. Lawrence, in the hands of the defense, before trial, would clearly have provided a major wedge leading to disclosure of Leuci's newly disclosed narcotics dealings. Faced with Lawrence's allegations before the trial, Leuci might have felt compelled to begin his admissions then. In any event, Lawrence has, in the post-trial period, led the defense to other witnesses and evidence corroborating his allegations against Leuci -- evidence which would have been of enormous value for trial preparation.

2.) Even if not Deliberate, the Federal Government Suppressed Evidence of "not insignificant use" which, if developed by Skilled Counsel, Could Have avoided a Conviction; Hence Rosner is Entitled to a New Trial

Even if the suppressions in this case could be regarded as non-deliberate, "hindsight discloses that the defense could have put the evidence to not insignificant use" at trial.

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[24] This tape was apparently no more difficult to find than the Goe memorandum (see footnote on p. 26, supra), once the government decided it wanted it.

Had Rosner's trial counsel possessed the knowledge which lay with the government, he would have had the opportunity to draw for the jury the outlines of the picture of Leuci we now know to be true -- that Leuci was a major criminal figure, involved in a variety of shocking crimes, ranging from "shakedown situations, to burglary and theft, to illegal narcotics dealings."[25]

To warrant a new trial as a result of negligent suppression the defense is, of course, "not required to show the probability of a different verdict upon retrial." United States v. Kahn, supra, at 287 (Emphasis added). All that need be shown is that there is a "significant chance that this added item (namely, evidence contradicting Leuci's testimony that his total prior misconduct was restricted to four information sale situations and implicating him in victim crimes and illegal narcotics dealings) developed by skilled counsel as it would have been could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." Id.[26] The trial judge's conclusion that the

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[25] Had Leuci denied on the witness stand his involvement in the Goe crime and in drug dealings with the Baron, the defense obviously would have been able to demonstrate that Leuci was a liar.

[26] In the recent Supreme Court case, Davis v. Alaska, ___U.S.___, 94 S.Ct. 1105 (1974) -- in which the Court reversed the conviction because the defendant had been deprived of evidence in the possession of the government establishing the past criminal conduct of a crucial prosecution witness -- the Court stated:

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning (i.e., that the witness had an ulterior motive stemming from his criminal past known to the prosecution) had counsel been permitted to try. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them (i.e., to have full disclosure of admissions of crime) so that they could make an informed judgment as to the weight to place on (the witness) testimony which provided "a crucial link in the proof, . . .of the defendant's act." Id. at 3120, quoting Douglas v. Alabama, 380 U.S. 415, 419 (1965). (Emphasis added)

non-deliberate suppression test was not satisfied was based squarely on his wholly mistaken belief that regardless of the degree of impairment of Leuci's credibility, the verdict could not have been different (see Slip Op. p. 12). This critical error is fully discussed in section "C" below.

That the trial judge may personally be "convinced of the correctness of the jury's verdict"-- does not in any way abrogate Rosner's right to a new trial in this case. This Circuit has ruled repeatedly that a new trial must be granted when "the denial of a new trial -- is inconsistent with the correct administration of criminal justice in the federal courts." United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969).

C. THE LOWER COURT'S CONCLUSION THAT LEUCI'S PERJURY AND THE GOVERNMENT'S SUPPRESSION DID NOT PREJUDICE ROSNER WAS IN ERROR; ROSNER'S CONVICTION WAS BASED DIRECTLY ON BELIEF IN LEUCI'S TESTIMONY AND ROSNER THEREFORE MUST BE GRANTED A NEW TRIAL

The trial court denied the pre-trial aspect of appellant's motion for a new trial, despite its finding that 1) Leuci engaged in "flagrant" perjury at Rosner's trial; 2) prior to that trial Scoppetta listened to the Leuci-Lawrence tape; 3) in that tape "Leuci demonstrates a familiarity with procedures whereby Lawrence would obtain 'packages' of heroin resulting from arrests"; 4) the "tape was not, however, disclosed to the defense prior to the trial"; 5) prior to trial, Leuci told four federal agents -- including an Assistant U.S. Attorney -- of his participation in a burglary during an unlawful search; 6) this incident "was dutifully memorialized in what has come to be known as the 'Goe memorandum'"; 7) neither the Goe memorandum nor the information therein which was known to both Shaw and Scoppetta was turned

over to the defense, though the government "concedes" it to "have been '3500 material'"; 8) both Shaw and Scoppetta were "deeply involved in the prosecution of the Rosner case."

The trial court held, in effect, that all these errors, suppressions, and government knowledge of facts inconsistent with Leuci's testimony must be deemed harmless error. It concluded that the jury verdict did not rest on Leuci's credibility; and that consequently, under <u>any standard</u> of prejudice -- no matter how minimal -- "the jury's verdict could not possibly have been affected" (Slip Op. p. 13).

> I therefore find that no matter how much Leuci's credibility could have been undermined, whether by a single additional incident or the full range of his crimes, the jury's verdict could not possibly have been affected.

Indeed, the trial court said that it would deny a new trial "even if Leuci's perjury is fully attributable to the government" (Slip Op. p 20) -- that is, it would have denied a new trial even if the government had been fully aware of the massive perjury at the time it was occurring and had coldly calculated to suppress this information from the defense. This conclusion reflects a complete misunderstanding of the harmless error rule and of the law regarding the knowing use of perjured testimony. In any event, as will now be demonstrated, this finding -- that the jury's verdict "could not possibly" have been affected -- is completely undercut by the trial record, the government's theory on the first appeal, the opinion of this Court on that appeal, and by a review of the trial evidence apart from Leuci's testimony.

The trial court acknowledged -- as it had to -- that Leuci's perjury "would be a matter of serious concern if his credibility had been crucial to the jury's determinations" (Id. at 26). It concluded, however, that:

> The trial was not a simple matching of Leuci's credibility against Rosner's; had it been, the arguments the defendant now advances would have infinitely greater persuasive power. Id. at 12. (Emphasis added)

The trial court's conclusion that the jury verdict "could not possibly" have been affected by the government's suppressions is apparently grounded on the government's recently advanced theory that Rosner's entrapment defense was wholly rebutted by the tapes and by Rosner's testimony,[27] and that Leuci's live testimony was "not crucial or of the least importance to the government's case."[28] (GPHM[29] p. 46, Ex. A., p. 24). The government asserts specifically with regard to Rosner's alleged predisposition that:

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[27] At times the trial court suggested that the evidence, entirely apart from Leuci's testimony, established that Rosner committed the illegal acts. He asserted that Rosner's admissions of virtually all of the elements of the various crimes charged" required the conclusion that Leuci's credibility was irrelevant (Slip Op. at 13). But that finding is obviously insufficient to sustain Rosner's conviction in the face of his entrapment claim. The only way that the judge's conclusion -- that "no matter how much Leuci's credibility could have been undermined. . .the jury's verdict could not possibly have been affected" -- could be sustained would be if the government's theory is correct that the tapes and Rosner's testimony, standing alone, destroy Rosner's entrapment defense.

[28] As will be seen below, throughout the trial, the government maintained the opposite position -- that conviction depended on believing Leuci's testimony.

[29] "G.P.H.M." refers to the Government's Post Hearing Memorandum submitted to the trial court in opposition to the defendant's new trial motion.

> The evidence that Rosner was ready, willing and able to commit the crimes charged on (Oct. 12, 13 and 19, 1971) was irrefutable and did not depend in any way on any uncorroborated conversation he had with Leuci. Given the tape recordings in this case and other circumstances, no rational juror could have in the least been affected by the fact that Leuci was more corrupt than heretofore known (E.P.H.M., Ex. A, p. 19). (Emphasis added) . . . .(Thus) the jury's rejection of Rosner's entrapment defense depended not a whit on any of Leuci's uncorroborated testimony (G.P.H.M., Ex. A, p. 40).

The record of the trial, the government's argument on appeal, the opinion of this Court, and the tapes themselves establish beyond any doubt, however, that most of the critical facts which supposedly "prove" Rosner's predisposition come solely from Leuci's live testimony, the rest being derived from interpretations of the tapes which depend, in the last analysis, upon believing Leuci's version of events.

(i) This was not a case where the evidence of predisposition was unambiguous. It was undisputed that Rosner initially rejected the offer to meet with Leuci and that DeStefano, Lamattina and Leuci discussed getting Rosner "in deeper" and "lean(ing) on" him (Tr. 218, 219). Moreover, the jury, after extensive deliberations, did acquit Rosner of two counts.

(ii) In viewing the evidence, for the purpose of determining whether Leuci's perjury and the government's knowledge and suppressions were prejudicial or harmless, this Court should not, of course, view the evidence in the light most favorable to the government, as it did when deciding on the original appeal, whether there was sufficient evidence to sustain the conviction. The judge below decided that the jury "could not possibly" have

failed to convict, and it is this standard that is being challenged in the instant appeal.

1) The Record Establishes that Rosner's Conviction Rested Upon Leuci's Testimony about the Unrecorded Meetings.

a) The government's presentation of evidence and arguments to the jury, and the jury's deliberations

Rosner's defense was premised on his version of certain unrecorded conversations. Leuci had been a participant in two of the most critical of these conversations -- one on October 4th, the other on October 8th[30] -- and his descriptions of those meetings flatly contradicted Rosner's. The government's constant message to the jury throughout the trial was that Rosner's conviction depended essentially on the jury's believing Leuci's -- and disbelieving Rosner's -- version.[31] The importance of Leuci's

[30] Other unrecorded conversations which were also important to Rosner's defense did not involve Leuci directly. For example, in his meeting with DeStefano on October 2nd (A. 499) and with Lamattina on October 4th (A. 506), Rosner was informed that Leuci had reported that Rosner was the target of various government investigations. But since neither DeStefano nor Lamattina testified, the government's attack on Rosner's versions of these conversations was limited to emphasizing the inconsistency between Rosner's story and Leuci's testimony about the same subject matter. (See Tr. 1307-1308). In other words, even when Leuci was not a participant in the conversation, the government relied on Leuci's word to impeach Rosner's credibility.

[31] That the jury would have to choose between the two was dramatized first by the cross examination technique utilized by the government trial attorney, Robert Morvillo. In questioning Rosner about the October 4th and October 8th meeting, Morvillo repeatedly forced Rosner to assert that Leuci was "in error" about various critical occurrences (see, e.g., Tr. 1010-1013, 1027-1030), thus hammering in the message that if Leuci's testimony was not "in error" then Rosner had not been entrapped.

credibility was highlighted in Assistant United States Attorney Morvillo's closing argument: The ringing theme was that Leuci told the truth, Rosner told lies, and therefore the jury could not possibly find that Rosner had been entrapped. Morvillo argued, for example, that:

> Not once, not once did Detective Leuci get caught in any lie, because he didn't lie. Mr. Kreiger -- you have all seen him -- is an expert. He is one of the best there is. Yet he couldn't shake Detective Leuci with regard to his testimony. There was no inconsistency in Detective Leuci's testimony (Tr. 1333).

And again Morvillo said:

> there is absolutely no reason in the world why Detective Leuci would get on that stand and lie to you about what happened. . . They are saying basically that Leuci was fooling both sides. He was lying to Rosner about Marcone, remand and murder and he was also lying to Shaw and Scoppetta about what was actually happening with Rosner.
>
> Nobody, nobody is that smart. Nobody is that venal. Why in the world would a man try to play that kind of a role lying to the very group of people who were supporting his 15-month undercover project --. (Tr. 1314-1315). (Emphasis added)

Of course it is now known that although Leuci did "not once. . . get caught in any lie" at the Rosner trial, he did in fact lie repeatedly and was indeed "lying to the very group of people who were supporting his 15-month undercover project."

Morvillo focused sharply on the unrecorded October 4th meeting as the event most critical to Rosner's defense: he advised the jury that a finding that Rosner was not entrapped would rest specifically and exclusively on crediting Leuci's testimony regarding that unrecorded meeting over and against Rosner's:

> So we come to the October 4th meeting. The October 4th meeting is a very important meeting. . .<u>if you accept the Government's version of what happened at the October 4th meeting, Rosner has committed a crime</u>.
>
> And that is why Rosner's version of the October 4th meeting is completely different from Leuci's, because he knows that <u>if you accept Detective Leuci's version of the October 4th meeting he wasn't entrapped</u>. He went there ready, willing and able to become part and parcel of a conspiracy to bribe, a conspiracy to obstruct justice, and of bribery and of obstruction of justice" (Tr. 1308). (Emphasis added)

Having set up a direct credibility contest, Morvillo then proceeded to emphasize, point by point, the various contradictions between Leuci's and Rosner's version of the 4th. Because the facts of October 4th <u>as testified to by Leuci</u> play a substantial role in the government's argument to this Court on appeal, and in this Court's analysis of the evidence on the entrapment issue, the critical contradictions in Leuci's and Rosner's versions of that day are reviewed (in some detail) in the analysis set forth in the margin.[32] Throughout the comparison of the two versions,

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[32] The following comparison of Leuci's and Rosner's testimony concerning the October 4 conversation shows that there were important discrepancies. (1) Leuci testified that he was frisked for a listening device (A. 69). Rosner denied that the search occurred (A. 512). (2) Leuci testified in substance that Rosner expressed an interest in obtaining information about the <u>Marcone</u> case (A. 72-73). Rosner testified in substance that he was not interested in obtaining information about the <u>Marcone</u> case except as to whether or not he was being investigated in connection with that case (A. 508-509). (3) Leuci testified that after discussing the <u>Marcone</u> case, Rosner brought up the <u>Rosner I</u> case and asked Leuci to get him information about it; that Leuci inquired what sort of information Rosner wanted; that Rosner replied that he wanted "3500 material", that Leuci expressed ignorance of the meaning of "3500" material; that Rosner replied that Leuci's contact would understand "3500 material"; and that Rosner requested information regarding the identities of the "good" witnesses in the case (A. 74-75). Rosner denied the

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critical facts of this story; he denied that he was the first one to mention the subject of obtaining information about his own case; he denied that he requested 3500 material or informed Leuci that his contact would "know" what this meant (Tr. 1011-13), Rosner's version was that after some discussion of the Rosner I case, initiated by Leuci, Leuci indicated that he "felt sorry" for Rosner and "would like to do anything he could to help"; Rosner replied, "If you hear anything. . . let us know" (A. 510-11). (4) Leuci testified that he had informed DeStefano on October 1 that Leuci's contact would require money in exchange for information; that on October 4th he informed Rosner directly that although his contact had not yet set a price for the information requested by Rosner, money would have to be paid soon; that he then received $400 from DeStefano (after seeing Rosner pass money to DeStefano) (A. 76-78); and that at the end of the meeting Rosner assured Leuci that if Leuci were able to acquire the requested information "there will be a lot more for him (the contact) in the future" (A. 80). Rosner testified that DeStefano, not Leuci, asked Rosner to pay Leuci money; that Rosner refused; that Rosner had no understanding, prior to October 4th, that money was to be paid; and that he had been informed previously by DeStefano that Leuci was passing on information to them as "a favor" (Tr. 858-859, A. 504). (5) Rosner testified that he was informed by Leuci on October 4th that the United States Attorney's Office was gathering evidence against him; that in particular the government was investigating the disappearance of Pedro Hernandez, a critical government witness in Rosner I, and that Rosner was suspected of having had Hernandez murdered; and that Rosner was also a suspect in the Marcone investigation; and that the government was going to ask for his "remand" to jail (A. 508-510). Leuci's testimony totally omits this occurrence and he specifically denied that he had informed Rosner that Rosner was a likely suspect in a murder investigation (A. 417). In his argument to the jury, Morvillo focused on this fifth area of contradiction between Leuci's and Rosner's versions as a major nail in the coffin of Rosner's entrapment defense.

> "No remand discussion, no murder discussion, no Marcone discussion. The fountainhead of Rosner's defense never happened" (Tr. 1308).

This direct, point-by-point comparison of Leuci's and Rosner's versions of October 4th leaves no doubt that Morvillo was correct; belief in Leuci's testimony destroyed Rosner's defense. First of all, if Leuci were telling the truth, then Rosner was lying about the 4th -- and perhaps about everything. Second, if Leuci were believed, then Rosner, after assuring himself that Leuci were not wired, coldly initiated requests for specific technical information about his own case, as well as for information about the Marcone investigation, and he knowingly, voluntarily entered into an arrangement to bribe a federal official to obtain that illegal information.

Morvillo stressed the decision which the jury faced: "Is Rosner telling the truth or is Detective Leuci, supported by those tape recordings, telling the truth?" (Tr. 1310).[33] Morvillo's summation also dealt at some length with the contradictions between Rosner's and Leuci's versions of the next most critical unrecorded meeting, that of October 8th. Morvillo again focused on the importance of the jury's determining the credibility of Leuci and concluding that Leuci was "telling the truth" (Tr. 1321, 1322).[34]

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[33] Morvillo's statements to the jury regarding the credibility contests between Leuci and Rosner, of course, fly directly in the face of the lower court's flat assertion that "(t)he trial was not a simple matching of Leuci's credibility against Rosner's" (Slip Op. at 12). While the trial may have been more than merely "a simple matching of Leuci's credibility against Rosner's", it was at least that -- and to deny it, as the judge did, is a clear distortion of the record of this case. The record leaves no doubt that throughout its presentation to the jury, the government strove to convince the jury that the trial was indeed a credibility match and that Leuci was the government's central player (with the tapes in a supporting role). Thus, whether a "simple credibility match" -- which the defendant vigorously disputes -- the government's unequivocal position at trial precludes it from now asserting that the tapes played the central role all along, and that Leuci was merely peripheral and dispensable.

[34] The main contradiction between Leuci's and Rosner's versions of the October 8th meeting were as follows: (1) Leuci testified that shortly after Rosner arrived, he voluntarily informed Leuci that Leuci would get the money for the 3500 material on October 12th, the very next date the banks would be open (A. 106-107). Rosner testified that DeStefano asked him to pay Leuci money, but Rosner initially refused, protesting that he had thought Leuci was obtaining the 3500 material as "a favor" (Tr. 869). (2) Leuci testified that after examining the Marcone indictment and taking and reading the 3500 material, Rosner voluntarily offered to pay $2,500 for the documents (A. 109-111, 130-131). Rosner testified that after his initial refusal to pay Leuci any money, DeStefano, Lamattina and Leuci became angry with him (Tr. 869); that DeStefano and Leuci told Rosner they had made commitments and Rosner was now responsible and had to pay his "share" (Tr. 870, 877, 879); and that after

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At no point during his summation did Morvillo suggest that the tapes alone might be sufficient in and of themselves to rebut Rosner's entrapment defense. On the contrary, he treated the taped conversations primarily as support for Leuci's versions of the earlier, unrecorded, meetings. In the face of this argument by the trial prosecutor, it simply cannot now be said that Rosner's conviction depended "not a whit on any of Leuci's uncorroborated testimony."

The trial judge's discussion of the evidence and his charge gave added emphasis to the centrality of the credibility issue. After carefully summarizing the government's version of the events (Tr. 1392-1402), and then the defendant's version (Tr. 1403-1418), the judge stated:

> Indeed, the versions of the Government and defense witnesses are in such sharp divergence on key points, that it may be suggested that this irreconcilable conflict is not due to forgetfulness or lack of recollection. Both versions cannot be true" (Tr. 1419). (Emphasis added)

That the jury understood its task cannot be doubted: several incidents during the deliberations reveal the serious

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Leuci suggested to Rosner that Rosner would lose his case and thus lose his "shingle", Rosner finally agreed to pay $2,500, the price quoted to him by DeStefano (Tr. 870, 874-875). (3) Leuci testified that at the close of the meeting, Rosner asked to take the Marcone indictment home to study it over the weekend, and Leuci gave it to him (A. 134-135). Rosner testified that during the meeting, he merely "glanced at" the Marcone indictment, informed Leuci he wanted nothing to do with it, and did not take it away from the meeting (Tr. 874, 876). (4) Leuci testified that Rosner asked Leuci for additional information about witnesses in the Rosner I case (A. 132). Rosner testified that Leuci volunteered to obtain for Rosner additional witness information, and to obtain the grand jury minutes, and that Rosner did not refuse (Tr. 871, 878-879).

attention which the jury gave to deciding the credibility issue.[35] After deliberating for six hours and then being sequestered overnight, the jury sent the following request to the judge:

> "That counsel for both sides indicate to us in the transcript, by the use of place markers, the direct testimony and cross of Mr. Leuci and Mr. Rosner, concerning their versions of occurrences during the period September 30 through October 4, 1971 . . . . (I)n this instance we would prefer to conduct our own review of such testimony" (Tr. 1460).

A later episode during the jury's deliberations highlights the fact that the jury was particularly concerned with evaluating Leuci's character and his own corrupt past. After deliberating for 4 hours more, the jury sent a note to the judge reporting that during the trial one of the jurors, while taking the subway home at night, had overheard a conversation about Leuci; that Leuci had been described in the subway as "a corrupt cop for . . . nine to eleven years"; and that the entire jury had discussed this piece of information (Tr. 1467). Morvillo's response to the jury's note belies any current claim that the government's case was not built squarely on Leuci's credibility. Morvillo requested that the jury be cautioned "in a very strong way" to ignore the subway conversation (Tr. 1468), arguing that "the information (about Leuci's corrupt past) is <u>derogatory of the Government's case</u> and inconsistent with the detective's testimony" (Tr. 1468). (Emphasis added) The trial court's strong instruction to ignore this information about Leuci was

[35] Even assuming <u>arguendo</u> that the impact of Leuci's perjury on the verdict should be measured only against a hypothetical jury -- a limitation the defendant rejects -- the evidence of the importance of credibility to the actual jury is relevant to a consideration of what should affect a hypothetical jury.

quickly followed by the return of the jury's verdict, thus suggesting that questions about Leuci's credibility may have been a critical log jam to the jury's unanimity.

b) The Government's Argument to This Court Concerning Rosner's Entrapment Defense

The government, in its argument to this Court on appeal, openly acknowledged that critical facts necessary to support the verdict, could be found only in Leuci's live testimony and that Rosner's conviction had depended specifically on the jury's belief in Leuci's version of the meetings:

> "The validity of Rosner's entrapment defense obviously depended upon what had transpired at the meetings between himself, DeStefano, Lamattina, and Leuci, and Rosner's version of what had happened was quite different from that of Detective Leuci's. Accordingly, the trial judge properly held that "the truth of the matter was for the jury to determine" (GB at 21).[36]

The government's rendition of those critical facts emphasized the following elements derived from Leuci's testimony concerning unrecorded conversations:

> " . . . Leuci finally did meet with Rosner for the first time on October 4. However, it was Rosner, not Leuci, who initiated the discussion about acquiring information in his own case as well as that of Marcone. When Rosner made the first overtures concerning the "3500" material, Leuci explained that he did not even know what "3500" material was. In addition, it was Rosner who, on October 8, fixed a price of $2,500. Again, on October 8, when Rosner met with Leuci to accept the "3500" material and the Marcone indictment, he indicated

[36] "G.B." refers to the Government's Brief on Appeal.

that he would pay for it on the following Tuesday" (G.B. at 22). (Emphasis added)[37]

In concluding its evidentiary rendition, the government focused in particular on Leuci's version of the unrecorded meeting of October 4th as the sine qua non of Rosner's guilt:

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[37] The government also included in its rendition, three items of evidence which superficially might appear to be derived solely from the October 13th and 15th tapes and not from Leuci's testimony. These were: 1) that on October 13th, Rosner agreed to pay for the grand jury minutes "despite Detective Leuci's statement that he did not believe that Rosner needed the grand testimony" (Emphasis in original); 2) that on October 15th, Rosner "on his own initiative, asked Leuci to supply him with . . . the Pulido 'yellow sheet'"; and 3) that"Rosner also approached Leuci concerning the acquisition of confidential information on the status of George Stewart." Upon careful examination, however, it turns out that the government's version of every one of these three "facts" also depended on believing Leuci's words: 1) Leuci's taped "statement that he did not believe that Rosner needed the grand jury testimony" cannot be treated as unequivocal evidence which stands on its own without regard to Leuci's credibility. When Leuci made that statement, he knew that he was being recorded, and he knew that the tape would likely be used to attempt to obtain a conviction of Rosner. The statement itself appears oddly out of context -- a non sequitur -- in the October 13th taped conversation (See G.X. 27a). Consequently, it is reasonable to conclude that Leuci made the statement for the simple purpose of establishing a record designed to defeat, in advance, any entrapment defense; 2) the government's assertion that Rosner initiated the request for Pulido's yellow sheet is based on Leuci's trial testimony (G.B. at 12, citing A. 173-174) and is simply not supported by the cold tapes. The transcript of October 15th records Leuci, not Rosner, as the initiator (Leuci offered, "You want is his yellow sheet?" and Rosner answered "Yeh." G.X. 28a, p. 5); 3) the government's assertion that Rosner "approached Leuci" to obtain information about Stewart is also based on Leuci's trial testimony (G.B. at 13, citing A. 176-178), and is wholly unsupported by the tapes of October 13th and October 15th. Indeed, the two recordings, reasonably interpreted, require the conclusion that Rosner was at most an observer of, and not a participant in, the Stewart matter.

> ". . .there is simply no evidence -- outside of Rosner's own self-serving statements -- that he was subjected to any coercive pressure by any government agent. Indeed, Rosner's conduct on October 4 in initiating the discussion with Leuci concerning the acquisition of the 3500 material was, in and of itself, proof that he was an eager participant in the scheme, grasping at the opportunity afforded him to profit at the expense of his professional responsibilities. The claim that there was insufficient proof of his predisposition is simply frivolous" (G.B. at 23). (Emphasis added)

It is obvious that the government's account of the critical facts, and hence the main thrust of its argument to this Court on the entrapment issue, was based squarely, if not entirely, on Leuci's unrecorded words; it was Leuci alone who testified that Rosner was the initiator on October 4th and 8th; it was Leuci alone who described the "conduct" which the government asserted was "in and of itself proof" of Rosner's predisposition.

Although the government noted that the tapes provided evidence of Rosner's willingness to pay bribes (G.B. at 24), it recognized that this evidence alone was not sufficient to dispose of Rosner's entrapment defense, since the taped conversations occurred after Rosner claimed his entrapment had occurred. The government correctly understood that the heart of Rosner's defense lay in the earlier meetings of October 4th and October 8th:

> ". . .Rosner claimed that enormous pressures had been placed on him at the two earlier meetings with Leuci, those of October 4 and 8, which had not been tape recorded. He also contended that he resisted these pressures vigorously and was wholly

> unpredisposed to commit the crime of bribery. The Government on the other hand, contended (on the basis of Leuci's testimony) that no one had induced Rosner to do anything at these unrecorded meetings and -- that in any event Rosner was a totally corrupt individual from the outset" (G.B. at 24).

The government thus conceded that it would be an "absurd proposition that the jury should convict Rosner of the later bribes" unless it also believed Leuci's unrecorded version of the earlier meetings.[38] In light of the government's argument before this Court on appeal -- namely that Rosner's non-entrapment was established by the unrecorded meetings -- the government should not now be heard to claim that Rosner's conviction "depended not a whit on any of Leuci's uncorroborated testimony."

c) This Court's Analysis of the Entrapment Issue

The decision rendered by this Court on the defendant's entrapment claims (485 F.2d 1213, 1221-1222) leaves no doubt that this Court viewed the entrapment issue as primarily a

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[38] The defendant does not contend that disbelief in Leuci's testimony must automatically produce belief in Rosner's. As it was at the trial, however, the judge found sufficient potentially credible evidence in Rosner's testimony to submit the issue of entrapment to the jury, and the jury believed Rosner sufficiently to acquit him on two counts. Were Leuci's credibility to have been totally devastated, surely the jury "might" have acquitted on the other counts.

"credibility match" between Leuci and Rosner,[39] and that it recognized that Leuci's testimony about the early unrecorded meetings was "crucial to the jury's determinations" of the entrapment issue. In its review of the evidence supporting the rejection of that defense, the Court laid particular stress on Leuci's version of Rosner's conduct on October 4th:

> "[A]. Despite these preliminaries, Rosner did appear for a meeting with the other three on October 4.
>
> "After discussing the Marcone case for a while, it was Rosner who asked whether Leuci's 'friend' would be able to help in Rosner's subornation case. It was Rosner who asked Leuci to get the '3500' material and to find out which witnesses were 'good' and which 'bad.' When Leuci stated his ignorance of what '3500 material' meant, Rosner assured him that his 'contact' would understand the term. Rosner told Leuci that if his friend obtained the things requested by Rosner, there would be a lot more money for him in the future." Id. at 1221.

This "evidence" about Rosner's early conduct, coupled with certain evidence about his later conduct,[40] satisfied this Court that the jury's verdict was proper.[41]

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39 The Court stated, 485 F.2d supra, at 1222:

> "There is not enough credible evidence, without the testimony of the appellant himself, to sustain the defense of entrapment. The trial court need not accept the defendant's version as true or take the question of his credibility from the jury. 'The truth of the matter was for the jury to determine.'. . . Judge Bauman properly left to the jury the credibility of the witnesses. They decided, on proper instructions, that the defense of entrapment did not stand up, and that predisposition had been proved beyond a reasonable doubt."

40 The evidence regarding Rosner's later conduct which this Court found significant was as follows: ". . .on October 13, when Leuci told Rosner that he did not see why Rosner needed

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In reaching its conclusion that the absence of an instruction that a separate inducement need not be shown with regard to the grand jury minutes, this Court again recognized the critical importance of crediting Leuci's version of the early meetings. The Court noted (Id. at 1223), that:

> "The evidence showed a single continuous course of dealing and no one suggested that there was anything but a single continuing inducement."

Therefore, under the Court's reasoning, the jury's rejection of the entrapment defense could have been premised only on believing Leuci's testimony that Rosner had not been entrapped in the initial phase of the course of dealing. The law of this case, then, is clear: Rosner's conviction was based on his failure to prove that he was entrapped at the early unrecorded meetings of October 4th and 8th.

The government's current assertion -- that Leuci's

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the Grand Jury minutes since he would get them eventually, and that they would cost an additional $1,000 or $1,500, it was Rosner who said that the Grand Jury minutes would be worth it to him, but that he must have them soon. Rosner also sought to determine whether his own client, Stewart, a witness in a separate case, was a government informer" (485 F.2d supra, at 1221). As has been noted previously, these particular items of evidence, although apparently supportable by the tapes alone, in the end depend upon believing Leuci's interpretation of events.

41 The Court added that evidence "(t)hat Rosner desired corrupt information in a number of cases tends further to establish his predisposition to obtain such information by unlawful means." (Id. at 1222). But the only evidence that Rosner "desired corrupt information in a number of cases" which was presented to this Court on appeal derived either directly from Leuci's testimony about Rosner's conduct (that Rosner initiated discussions about Marcone on the 4th and Rosner took home the Marcone indictment on the 8th) or from an interpretation of Rosner's taped statements regarding Stewart which depends on believing Leuci's version of the events.

testimony is wholly superfluous -- is thus completely inconsistent with the factual premises of this Court's opinion in United States v. Rosner, supra. The government seeks now to save the conviction by substituting the tapes and Rosner's testimony for Leuci's testimony regarding the October 4th and 8th meetings. But the tapes and Rosner obviously do not provide the same "evidence" -- establishing Rosner's conduct as the initiator on October 4th and 8th -- which the government and this Court specifically stressed as central and critical to the rejecting of the entrapment defense. Thus, regardless of what evidence the tapes and Rosner's testimony do provide, the law of this case -- establishing Rosner's non-entrapment on October 4th and 8th -- absolutely precludes the government's current assertion that Leuci's live testimony is irrelevant.

2) The Tapes and Rosner's Testimony Do Not Irrefutably Establish Rosner's Predisposition

The government asserts that the tape of October 13th "is a death blow to Rosner's entrapment defense," (GPHM, Ex. A, p. 31), the tape of October 15th "equally puts the lie to" that defense (Id. Ex. A, p. 35), and together "(t)hese (two) recordings themselves belied beyond any shadow of a doubt any entrapment defense" (Id., Ex. A, p. 24).

The government's underlying premise -- that the content of the tapes can be interpreted in only one way, and that the interpretation is fatal to Rosner's defense -- is simply wrong. Once Leuci's in-court testimony is discounted as non-credible, and the tapes are analyzed without regard to Leuci's version of

Rosner's prior conduct or to Leuci's interpretation of the recorded statements. The recorded statements themselves are ambiguous, at best, as to whether Rosner's conduct on the 13th and thereafter showed predisposition, or whether by that date Rosner had already been entrapped and was merely responding to prior inducements despite his lack of predisposition. Indeed when the tape selections relied on by the government are examined in context, and when other critical passages are taken into account, it becomes unmistakably clear that the tapes are wholly consistent with Rosner's defense and that the government's interpretation of them ultimately depends upon believing Leuci's word. In appellant's original brief on this appeal, he presented a careful and lengthy analysis of each of the tape selections relied on by the government demonstrating that without Leuci's disputed live testimony, they do not establish predisposition. Unfortunately, this analysis had to be eliminated from the brief because of length constraints. If the government repeats its erroneous argument on appeal, appellant reserves the right to present his analysis in a reply brief. For the present, appellant will address but one of the government's arguments on predisposition.

In an effort to establish Rosner's predisposition, the government -- at trial and on appeal -- relied upon Rosner's alleged interest in obtaining information about cases other than his own -- particularly about the so-called Marcone indictment. To the jury, the government presented the following version of events:

> "Rosner asks about the Marcone indictment on the 4th. He tells Leuci what he has learned about the Marcone case. I guess maybe it is a hobby of Rosner to go around collecting information about government investigations that he is not involved in, because, boy, he knows an awful lot about that Marcone case" (Tr. 1308).

The jury was further informed that on October 8th Rosner took the Marcone indictment to study it at home over the weekend (Tr. 1321-1323). This version was, of course, based entirely on Leuci's testimony and was substantially disputed by Rosner (See A. 508-509, Tr. 874-876). To this Court, the government argued, again based entirely on Leuci's testimony, that on October 4th "it was Rosner, not Leuci, who initiated the discussion about acquiring information in his own case, as well as that of Marcone," and on October 8th "Rosner met with Leuci to accept . . . the Marcone indictment" (G.B.at 22). This Court attached significant weight to Rosner's alleged interest in the Marcone case, finding on the basis of that coupled with his alleged interest in Stewart's whereabouts, that Rosner's desire for "corrupt information in a number of cases tends further to establish his predisposition."

The government's current omission of the previously critical Marcone matter from its recent theory is thus extremely significant though understandable. In the absence of Leuci's testimony, the tapes directly refute the government's previous argument regarding Rosner's interest in obtaining Marcone information. On the October 12th tape, an exchange occurs in which DeStefano clarifies that he, not Rosner, was the one who wanted the Marcone indictment:

"Det. Leuci: . . .and he wanted the Marcone thing right; he didn't want that but he wanted it

"DeStefano: I wanted, I wanted Marcone. You did me a favor over there. I can't get you no money off this guy" (G.X. 26a, p. 17).

On October 13th, Rosner -- who did not know, of course, that he was being tape recorded -- reiterated his lack of interest in the Marcone indictment, and Leuci acknowledged that Rosner had had "nothing to do with that":

"Det. Leuci: Whether I misunderstood you (DeStefano) and Eddie (Rosner) or however it worked in other words I came to him, I said to him, 'I want the 3500 material, I want the indictment on Marcone,'

"Rosner: That has nothing, I don't want nothing to do with that.

"Det. Leuci: All right OK That shouldn't have been put in" (G.X. 27a, p. 15).

It was only Leuci's live testimony that cast these taped statements in a different light and permitted the government to argue that Rosner's conduct regarding the Marcone case was probative of his predisposition. On the face of the transcripts, Rosner had no such interest. Indeed, Leuci's words -- "whether I misunderstood you and Eddie or however it worked" -- would seem to constitute an admission by Leuci that quite possibly it was his, not Rosner's, idea to obtain the Marcone indictment (as well as the 3500 material).

Nor does the record support the government's claim that Rosner's predisposition is established by taped evidence that Rosner "shockingly told him to get information about Stewart";

that Rosner participated in a "corrupt conversation concerning the Quinones case"; or that Rosner acted like a "calculating professional" in his dealings with Leuci. A careful analysis of the tapes -- which appeared in appellant's original brief and which appellant reserves for his reply brief -- demonstrates that the taped excerpts relied on by the government do not establish predisposition in the absence of Leuci's live testimony. Appellant is confident that no fair reading of the tapes can support the government's current contention that "the jury's rejection of Rosner's entrapment defense depended not a whit on any of Leuci's uncorroborated (that is, untaped) testimony." Nor can any fair reader agree with the lower court's wholly undocumented conclusion that "the jury's verdict could not possibly have been affected" even by the knowledge that Leuci was a full time crook and "flagrant" perjuror. Accordingly, even under the legal standards relied on below, a new trial must be ordered.

If a new trial is ordered and it turns out that the government and the lower court were correct (i.e., if the case against Rosner rests not one whit on Leuci's credibility), then little harm will have resulted: justice will have been done at the cost of a new trial. If, on the other hand, a new trial is denied and the government and the lower court were wrong (i.e., if the case against Rosner rested in any substantial way on Leuci's credibility) then a major injustice will remain uncorrected. When presented with this choice, appellant respectfully contends that an appellate court should resolve doubts in favor of granting the new trial.

LEUCI'S PERJURY: THE GOVERNMENT'S POST-TRIAL SUPPRESSIONS

A. The United States Attorney's Office Deliberately Withheld Relevant and Crucial Evidence from the Defendant and from the District Court Immediately after the Conviction, Before the Imposition of Sentence, and Before and During the Pendency of a New Trial Motion

STATEMENT OF FACTS

The facts giving rise to this contention are not in dispute:

1) Shortly after trial, as a result of Rosner's continued efforts to discover information regarding Leuci's criminal past, Rosner discovered several witnesses who claimed to have personal knowledge of Leuci's drug dealings. On January 12, 1973, Rosner filed a motion for a new trial based on these witnesses. On January 26, 1973, Judge Bauman held a hearing. After listening to their testimony, the judge found the new witnesses -- all long-time heroin addicts -- to be not credible, and he rejected their allegations regarding Leuci (Id. at 178-180). The judge thus denied Rosner's first new trial motion -- but he did not then dispute Rosner's claim that if Leuci had perjured himself Rosner would be entitled to a new trial.

2) At the very time that this first new trial motion was going forward, a series of events was occurring in the United States Attorney's office of which the defense was ignorant. These events are recounted in the government's own affidavits[42] as follows:

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[42] The affidavits referred to in this section were submitted in opposition to the defendant's third new trial motion on April 9, 1974.

a) On December 21, 1972 -- just two weeks after the Rosner jury verdict and three weeks before the filing of his new trial motion -- Richard Lawrence, a/k/a the Baron, informed Special Assistant District Attorney Frank Rogers that, for a period of years, Detective Leuci had given him varying amounts of narcotics to sell and had shared in the profits (Rogers' affidavit; District Court opinion at 21).

b) On January 2, 1973, this information was communicated to the United States Attorney, who assigned Robert Morvillo to "(coordinate) an investigation to determine the accuracy of these allegations" (Morvillo affidavit; District Court opinion at 21).

c) On January 2, 1973, Morvillo assigned Charles Sherman, an investigator with the Drug Enforcement Administration, to conduct "a complete investigation." In an interview that day, Lawrence told Sherman that "he had participated in numerous illegal narcotics transactions with Detective Leuci dating back to the Summer of 1968" (Rogers' affidavit). Lawrence also said that he had given Leuci three automobiles as partial payment for some of the aforementioned transactions.

d) During approximately January 10-17, 1973, Sherman and his assistant Inspector Wolf, conducted an investigation.

e) On January 17, 1973, Lawrence was flown to Falls Church, Virginia, where he was given a lie detector test by a firm known as True Securities Industries, Inc. Sherman was told that Lawrence had failed the test.

f) On January 18, 1973, Morvillo was informed of the result of the test.

g) During the week of January 21, 1973, the government "determined that no further investigation was warranted" (Sherman' affidavit).

3) On January 26, 1973, the hearing was held on Rosner's new trial motion. "At no time during the pendency of this motion did the government inform Rosner of Lawrence's allegations" (District Court opinion at 21-22). The trial judge made an explicit finding that the non-disclosure of the Lawrence allegations was "a deliberate decision" (H. Tr. at 330).

In the face of these undisputed facts, the government contends that it was never obligated to disclose the Lawrence allegations for the reason that it had conducted a thorough investigation and had concluded that Lawrence was lying (H. Tr. at 284-295; testimony of Morvillo). The government now acknowledges, of course, that some important aspects of the Lawrence allegations were true -- e.g., that Leuci gave Lawrence drugs and that Lawrence paid him for protection.

The critical disputed factual issue on this aspect of the case, therefore, is whether the Morvillo-Sherman investigation was sufficiently thorough and complete so that the government could properly have assumed that the defense could have made no use whatsoever of the Lawrence allegations.[43] The district court --

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[43] Defendant does not of course, concede that any governmental investigation could ever replace its obligation to disclose evidence potentially helpful to the defense. (See, e.g., Ashley v. Texas, 319 F.2d 80 (5th Cir. 1963), cert. denied, 375 U.S. 931; United States v Poole, 379 F.2d 645 (7th Cir. 1967). But the government's claim here is that its failure to disclose was justified by its investigation. So the thoroughness of the investigation is the critical pillar of the government's argument.

for legal reasons which appellant challenges on this appeal -- did "not find it necessary to pass on the adequacy of the government's investigation of Lawrence's allegations" (D.C. at 22). The court did conclude, however, that "the prosecutors could not help but recognize the similarity between Lawrence's charges and those contained in the affidavits submitted in support of Rosner's motion; they should thus have realized that the information supplied by Lawrence might have been of some assistance to Rosner in substantiating the contentions advanced in the motion" (Id. at 22).

The Morvillo-Sherman Investigation of Lawrence's Allegations

The record reveals that there were four essential aspects of the Morvillo-Sherman investigations: 1) the effort to locate third-party witnesses to Leuci's alleged drug dealings; 2) the attempt to determine whether Lawrence had, in fact, given Leuci several cars; 3) the so-called "exculpatory" tape recording of the Leuci-Lawrence conversation; and 4) the polygraph test.

1. The effort to locate third-party witnesses

Morvillo testified unequivocally that Lawrence's allegations included the name of only one witness, other than Lawrence himself, to Leuci's alleged drug dealing -- a man identified only as "John."[44] Morvillo was adamant that "had there been anybody else named, I can tell you that I would have insisted that those people be interviewed and perhaps even be brought into the U.S.

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[44] "There weren't any (other witnesses), other than the person (John) who we made extensive efforts to locate (H. Tr. at 312). Morvillo swore further that he " specifically discuss(ed) with Mr. Sherman whether or not there was anybody else that we could have interviewed and the answer was, not that he was aware of" (H. Tr. at 317).

Attorney's office" (H. Tr. at 313). As for "John," Morvillo testified that Sherman "had made great efforts to locate John, to identify him so that we could interview him . . .." (H. Tr. at 277). Sherman's testimony at first corroborated Morvillo's statements that a) Lawrence gave only the first name "John", and b) Lawrence did not give sufficient information to locate "John."[45]

This testimony -- to the effect that the Lawrence investigation was as complete as possible, and that every lead was followed -- was given before the defense came into possession of Sherman's handwritten notes of Lawrence's statements to him. These notes -- which the government vigorously resisted turning over to the defense -- establish (H. Tr. at 409-410) that the testimony of both Morvillo and Sherman was entirely inaccurate and that Morvillo's major premises were completely false.

The notes themselves reveal that a) "John" was not the only name of a corroborating witness to Leuci's drug transactions which Lawrence gave to Sherman, and that b) Lawrence gave Sherman much more information about how to locate "John" -- which Sherman never followed up.

a) Regarding names other than "John", on the same page of Sherman's notes, the following two numbered paragraphs appear:

> "1) Leuci assigned to Brooklyn D.A.'s office 1971 called Larry down to office introduced Larry to John Doe Robert - told Larry to deliver 1/8 kilo heroin to Robert - Larry delivered to Robert at park by D.A.'s office. Robert owns clothing store on Utica Ave. 2 blocks south of Eastern Ave. in Brooklyn.

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[45] "I asked him that during this period of time that you never knew more about him than his name was John. He told me no" (H. Tr. at 392, 394, 395).

"2) John Doe Saint - owns cab company on Bedford Avenue in Brooklyn. Larry was going to buy cabs from Saint - he owed Leuci money for heroin. Saint asked Larry to get heroin. Larry talked Leuci into giving Saint more heroin to be able to pay Leuci. ADA Hershey knows this guy."

In the face of this written evidence, the government ultimately conceded and stipulated that Lawrence informed Sherman about a man known as "the Saint," as well as about "John," and that Sherman could have discovered the full name and location of "the Saint" by simply picking up a phone and calling a public official, Assistant D.A. Hershey. Moreover, the government stipulated that Sherman never followed any leads and, indeed, made no attempt whatsoever to track down "the Saint."[46]

b) Regarding efforts to locate "John," the following statements appear in Sherman's notes, under the heading "how to find John":

1. Chris was arrested in Brooklyn - 1-1/2 years ago. John paid $500 bail.
2. Wong married to John's sister - Donald Wong, 40 Lake Shore Drive, Patterson, New York.
   Rep. for: International Correspondence Schools, Scranton, Pennsylvania 18515
   914: 279-3851[47]

   John
   always plain black oxfords (military type) thinks he is a fireman.

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[46] If this information had been given to the defense, there is no question that efforts to locate "the Saint" and to determine whether or not he could corroborate Lawrence's allegations would have been made.

[47] A recent call to this number by defense counsel revealed that this was, in fact, Wong's correct number. A motivated defense attorney was thus able - in one minute - to corroborate more of Lawrence's allegations than the government was able to in its entire 65 man-hour "investigation."

After being confronted with these notes, Sherman admitted that he never followed up any of these leads; he never called the telephone number given; he never inquired of the place of employment of John's brother-in-law, nor checked to see whether a forwarding address had been left. Sherman's admissions directly contradict Morvillo's and Sherman's own pervious testimony. Moreover, Sherman's notes and subsequent admissions leave no doubt that this aspect of the investigation was, shoddy, unprofessional, and utterly incomplete. It simply cannot reasonably be concluded that Sherman provided an adequate substitute for disclosure to defense counsel.

2. The attempt to corroborate the car gifts

At the hearing on the instant motion, the government attempted to explain the car transfers by relying on Leuci's testimony that he had paid for one of the transferred cars -- a 1966 Ford station wagon -- by a check for $400 dated September 1971. Leuci had allegedly produced this check during the Morvillo-Sherman investigation, and had thus satisfied the investigators that Lawrence's claim that he "gave" Leuci 3 cars was baseless.

The very documents relied on by the investigators in January 1973, however, contain factors which undermine the governments theory. First, Leuci testified that he received the car some considerable time before he paid for the car by check in September 1971. Yet, the car documents show that Lawrence's wife did not purchase the car from the dealer until October 28, 1971. The documents further establish that the car was not registered by Leuci's wife until months later in Spring 1972. Thus, the

documentary records, supposedly relied on by the investigator, establish that the $400 check could not have been in payment for the car as Leuci claimed. Yet, the matter was closed in January 1973 to the satisfaction of the government without any further attempt to clear up these inconsistencies (H. Tr. at 485). Obviously, a defense attorney interested in corroborating Lawrence's allegations and not in suppressing his significance would have probed more deeply. Surely this "investigation" cannot justify the government's deliberate decision to withhold from the defendant and from the court information which even the trial judge found "might have been of some assistance to Rosner. . . ."

3. The "exculpatory" tape recording of the Leuci-Lawrence conversation

The government now acknowledges -- by stipulation of Mr. Sagor (H. Tr. at 993) -- that the Leuci-Lawrence tape was among the "factors" considered by Morvillo in deciding not to disclose the Lawrence allegations in January 1973.[48] Morvillo now acknowledges that he never listened to the tape nor read a transcript of it (H. Tr. at 990); and that he relied on Leuci's self-serving -- and, it turns out, entirely inaccurate -- statement that the tape "exonerated Leuci with respect to the allegations against Leuci of Leuci's involvement (in narcotics

[48] It is interesting to note that when Morvillo was specifically asked to list the "other factors" he considered, he omitted mention of the tape (H. Tr. at 321).

It is also interesting to note that until the next to the last day of the hearing on the instant motion, no mention was made of the existence of this tape and it "only came to light . . . when Leuci made an inadvertent reference to it" (Slip Op. at 6). Even then, the government attempted to perpetuate its cover-up, vigorously resisting disclosure (See H. Tr. at 330).

transactions)" (H. Tr. at 990). Morvillo's reliance on that tape, without hearing it or reading a transcript of it can only be explained by recognizing Morvillo's strong motivation to find that Leuci was telling the truth.[49] Surely a defense attorney -- motivated to establish that Leuci was lying -- would not have accepted Leuci's statements; he would have listened to the tape, and would have heard Leuci in the act of committing a serious felony in March of 1971 and in the act of admitting knowledge of other serious felonies. Again, this aspect of the investigation can only be described as shoddy and incomplete and cannot be deemed legally adequate to justify suppression from the defense.

4. The Polygraph Test

When confronted with the inadequacy of his own field investigation, Charles Sherman ultimately fell back on Lawrence's alleged failure of the polygraph test as the critical factor in the termination of the investigation and in the failure to disclose Lawrence's allegations to the defense (See e.g., H. Tr. at 349).

It has been -- and except for this case it still is -- the unwavering position of the United States Government that the polygraph has not been accepted "by the scientific community as a reliable and accurate means of ascertaining truth and

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[49] Indeed, Morvillo had been quite anxious to obtain "proof" that Lawrence was lying and Leuci was telling the truth. Leuci in fact testified that Morvillo was "quite annoyed at" the fact that the Lawrence allegations had surfaced (H. Tr. at 86). Leuci further testified that Morvillo expressed relief, stating that he (Morvillo) felt "much better" (H. Tr. at 87) when the investigation had "proven" that Lawrence was lying.

deception." Government's brief in United States v Hart, No. 70 Cr. 107 (Nov. 7, 1971), at p. 4.[50] For the government suddenly to change positions and to assert that the polygraph results in this case were so reliable that they could serve as a substitute for disclosure to the defense is untenable. This is especially so in light of the admittedly sloppy procedure by which the government selected True Securities as the firm to administer the polygraph. Patrick Fuller, A DEA Administrator who chose True Securities, testified that his choice was based on "a brochure about the new office opening" (H. Tr. at 424). Fuller's office had no previous experience whatsoever with that firm (H. Tr. at 424).[51]

It is not surprising, therefore, that the nationally recognized polygraph experts, whose testimony and affidavits were introduced at the recent hearing, categorically disagreed with the conclusions reached by True Securities about Lawrence's performance on the polygraph test.[52]

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[50] The "lack of professional standards along suggests that the field itself lacks the discipline so often necessary to produce reliable and meaningful results" U.S. v. Hart, supra at pp. 6, 7. The very same statement has been made in other government briefs as well; see, e.g., United States v. Zeigler, U.S. Dist. Ct., D.C. Crim. Case No. 1831-70 (350 F.Supp. 685) (Opposition to defense motion to admit polygraph testimony).

[51] When asked whether he had any information regarding the competency of the firm's president, Ralph True, as a polygraph examiner, Fuller replied, "Mr. True is not a polygraph examiner" (H. Tr. at 424). Nor did Fuller have any "outside information about Mr. Mahoney's (the polygraph operator's) qualifications as a polygraph operator"; all he knew is what he had read in the advertising brochure and what Mr. True told him (H. Tr. at 424).

[52] Nor is it surprising that this fly-by-night outfit remained in business for a total of five months before it folded for lack of business (H. Tr. at 525).

Cleve Backster, after examining the charts of Lawrence's polygraph, testified that the charts "were entirely inconclusive" (H. Tr. at 690), and that "no expert could reasonably conclude on the basis of these charts positively that (Lawrence) was lying" (H. Tr. at 696).[53] Victor Kaufman, after examining the charts "extensively" (H. Tr. at 496), testified that the Lawrence charts were "rather flat" (H. Tr. at 495), and that there is "no way" one could reach a conclusion of deception on the basis of these charts (H. Tr. at 509-510). The trial court made no finding on the adequacy of the polygraph test, but it did acknowledge that appellant "introduced several experts who testified that Lawrence's polygraph test was at worst inconclusive and could by no means have been adjudged a failure" (District Court opinion at 22).

Finally, the case of United States v. Hart, 344 F. Supp. 522 (E.D.N.Y. 1971, Judd, D.J.) is dispositive against the government's position. In Hart, the government subjected a witness to a polygraph test, which the government claimed he failed. The government failed to disclose this to the defense. The Court held that "under the Brady principle, the burden should be on the government to convince a jury that this test was of no significance" (Id. at 523). The "defendants are entitled to inquire concerning any investigations made by the government which might have put it on notice that a government witness was untruthful. Cf. Napue v. Illinois, 360 U.S. 264 (1959); United States v.

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53 Backster testified that the administration of the test appeared defective (one of the standard indexes "was extremely sluggish to the point of being non-productive" (H. Tr. at 691); the control question was "very poorly formulated" (Id.); and the charts are "very flat" (H. Tr. at 705) and "contained no evidence of deception" (H. Tr. at 698).

Polisi, 416 F.2d 573, 577 (2d Cir. 1969)." Most significant for the instant case, the Hart Court held that once the government decides to submit a witness to a polygraph test, it undertakes certain obligations of disclosure:

> "Having requested that Mr. Atkinson submit to polygraph tests, and then rejected the conclusions of the tests, the government should be prepared to show (a) the prior experience with polygraph tests and with the particular testers which led the Bureau of Narcotics and Dangerous Drugs to have Leslie Atkinson submit to the tests; (b) the basis for the subsequent doubts about the validity of polygraph tests which led to the disregard of the results; and (c) any other relevant material concerning the tests which defendants may request from the government on their own behalf" (Id. at 524).

The fact that the witness here, Lawrence, was making allegations contrary to the government's interest obviously cannot abbrogate the government's obligation of disclosure. Once the government decides that a polygraph test should be administered to a witness potentially useful to the defense, it must disclose to the defense the fact that the test was administered, any claimed results, and the factors that led it to conclude that the results did or did not impair his credibility (Cf. Hart at 524). It is for the defense, not the government, to decide what use to make of these matters. This is especially so in a case -- like the instant one -- where the test was, at best, inconclusive and, at least according to some experts, consistent with the truth.

ARGUMENT

Appellant contends that the government had an unequivocal obligation to disclose the Lawrence allegations at the time of the first new trial motion. The District Court, after hearing the

evidence, concluded that "the prosecutors could not help but recognize the similarity between Lawrence's charges and those contained in the affidavits submitted in support of Rosner's motions." It also concluded that the prosecutors "should . . . have realized that the information supplied by Lawrence might have been of some assistance to Rosner in substantiating the contentions advanced in the motion (for a new trial)" (District Court opinion at 22). And finally, it found as a fact that Assistant United States Attorney Morvillo's decision not to disclose the Lawrence allegations was a "deliberate decision" (Hearing transcript at 330).

Despite the overwhelming showing of the inadequacy of the investigation, the District Court avoided making a finding that the investigation was in fact a sham. Instead, it ruled, as a matter of law, that neither the government's investigative ineptness nor its failure to notify Rosner of Lawrence's allegations could justify granting a new trial because the defendant "was in no way prejudiced." The Court reasoned that "all that resulted was the denial of a new trial motion" -- a motion that Rosner was free to make again:

> "Where post-trial suppression is alleged. . . the court's proper inquiry is into the effect of the disclosures on any new trial motion that has been made. Thus, the most Rosner would be entitled to . . . is a finding that my decision on his first new trial motion might have been affected by the new evidence, and my affording him another opportunity to move for a new trial. In the hearing on his most recent motion, he has been given that opportunity" (District Court opinion at 23).

In effect, the District Court ruled that there is no remedy for deliberate suppression of information which the

prosecution realizes would assist a defendant in "substantiating" his argument for a new trial. Such a holding deprives a convicted defendant of any redress whatsoever when pertinent information is withheld from him indefinitely -- indeed, in perpetuam. It should be quite clear that to allow the government to act as it did in this instance, without imposing any judicial sanction other than a hortatory call for more professionalism in the future, would be to signal that such breaches are not regarded as serious by the courts.

The Seventh Circuit recently confronted a case of post-trial suppression and deemed reversal to be the "required" penalty for the government's transgressions, despite the conceded fact that the defendant had not been specifically prejudiced by the suppression. United States v. Ott, 489 F.2d 872 (7th Cir. 1973). Ott was convicted on three counts of knowingly possessing checks stolen from the mail. Moshis, a government informer, testified that he and T.W. Allen had bought checks from mailmen and sold them to the defendant. Ott's counsel's attempts at trial to establish that Allen was also an informer were met by denials by the prosecutor. Upon questioning during oral argument before the Court of Appeals, however, government counsel conceded that T.W. Allen was the same person identified as "a reliable informant," in another case heard on appeal.[54]

Although the Court assumed that the government trial attorney had not known he was making a false representation at trial, the Court had harsh words for the Government's handling

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[54] United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973).

of its error discovered subsequent to trial:

> "(T)his court is entitled to expect candor from attorneys representing the United States. Even though appellate counsel for the government knew that trial counsel had misled the trial judge in connection with a ruling challenged on appeal, no disclosure of that fact was made to the appellant or to this court prior to oral argument. Only after questions from the bench, which were prompted by familiarity with the record in the Carmichael case, did government counsel make the disclosure. At that time the acknowledgement was both forthright and unequivocal. Nevertheless, if silence would have served to perpetuate continued judicial reliance upon the prosecutor's false statement, it is evident that the attorney for the sovereign would have been content." Ott, at 874.[55]

The Ott Court found a "combination of factors" which, together, compelled reversal. Ott, supra, at 875. First, the Court noted that the misrepresentation at trial was made by a member of the United States Attorney's office. The deliberate suppression of the Lawrence information in this case was effected by attorneys of that same office. Second, the Ott Court

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[55] The Court cited the American Bar Association's Final Draft of the Proposed Code of Responsibility at 107, stating "Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal. . .is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers." The Ott Court observed that the "principle underlying such a rule is broad enough to encompass not only deceptive acts, but also deceptive omissions" (footnote omitted). Ott, supra, at 874. See also the American Bar Association's Project on Standards for Criminal Justice, which gives explicit recognition to the prosecution's "continuing" obligation to notify the defense of information suggesting that trial testimony -- including credibility evidence -- may have been false. The Prosecution Function and the Defense Function, Supp. March 1971, at p. 9, §5.6(a) and Commentary. And see United States v. Polisi, 416 F.2d 573 (2d Cir. 1969); cf. United States v. Harris, 498 F.2d 1164 (3d Cir. 1974), Christman v. Hanrahan, 500 F.2d 65 (7th Cir. 1974).

noted that the trial prosecutor had made an "unequivocal" assertion that T.W. Allen was not an informer. Here, the government had previously insisted that its "thorough" investigation had "proven" that Lawrence's allegations about Leuci's illegal involvement in drug traffic were entirely false; this assertion has now been significantly qualified. Further, in Ott, "even though Allen's true status was collateral to the issue presented to the judge, both parties sought to influence the court in the exercise of its discretion by appealing to different versions of that status. Id. Obviously, Leuci's "status" was significantly less collateral than was Allen's in Ott's trial. Indeed, at the first new trial motion -- during which the Lawrence allegations were suppressed -- the only issue was Leuci's credibility and alleged criminality.

The final -- "and perhaps most troublesome" -- aspect of the government's lack of professionalism in Ott was its failure to apprise the Court of Appeals (or the appellant) of the true facts "long after the pressures of the trial were past." Again, there is a clear parallel in the case at Bar. The decision to withhold the Lawrence information from Rosner was deliberate and sustained over a period of time: it was not made during the stress of a trial. As this Court has observed:

> "Prosecutors under such stress (as a result of the defense strategy of calling a key witness last and the resultant need for the prosecution to prepare rebuttal testimony between an afternoon recess and the following morning) cannot properly be held to standards quite as exacting as those that may be appropriate when they have had days or even weeks to consider whether a disclosure should be made." United States v. DeSapio, 435 F.2d 272, 288 (2nd Cir. 1970).

In Mesarosh v. United States, discussed supra, while the case was before the Supreme Court, Solicitor General Rankin felt "compelled" by his "duties as officer of the Court and as public prosecutor" to call the Court's attention to the new information relating to the credibility of a witness. All this information had been developed after the verdict; there had been no pre-trial suppression. The Supreme Court commended "the action of the Solicitor General . . . in promptly bringing the matter to our attention when it came to the attention of his office. . .." The clear implication of these statements is of course that the government attorneys would have been derelict in their "duties as officers of the Court and as public prosecutors" had they deliberately decided -- as Morvillo concededly did in this case -- not to bring the information to the attention of the court before which a proceeding was pending.

The appropriate remedy for the government's failure to disclose here -- and the only remedy which would deter post-trial suppression -- is the granting of the relief which Rosner was requesting at the time that the suppression occurred. The trial court's reasoning -- that Rosner was not "prejudiced" by the suppression during the first new trial motion because he was able later to use the suppressed information in another new trial motion -- would mean that a convicted defendant could never be found to be "prejudiced" by post-trial suppression. Under the judge's ruling, if and when a defendant were to discover post-trial suppressed evidence he could simply move for a new trial at that time. The point apparently missed by the judge is that under his rule the government would have nothing to lose -- indeed

it would benefit -- from its suppression in this and in future cases, since the defendant might never learn of the suppressed evidence.[56] Thus, any remedy short of a new trial will reward the government for its own misconduct and encourage such behavior in future cases. This is an especially important consideration in this case since here, the government has continued to suppress, to cover-up its suppressions, and to cover-up its cover-ups through the very hearing that is the subject of this appeal.

B. The United States Attorney's Office Deliberately Withheld Crucial Evidence from the Defendant, from the Solicitor General's Office, and from the Supreme Court, Until After the Supreme Court had Denied Defendant's Petition for a Writ of Certiorari.

STATEMENT OF FACTS

The facts giving rise to this contention are not disputed.

1) In January, 1974, defendant filed a petition for a writ of certiorari in the United States Supreme Court in which he alleged, inter alia, "that Leuci had been involved in extensive narcotics violations and shakedowns since 1967."

2) On March 20, 1974, defendant filed a motion for a new trial based on newly discovered evidence of Leuci's past criminality.

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[56] It is important to note that the trial court's no-prejudice ruling was not like that sustained by the Court in Chapman v. California, 386 U.S. 18 (1967) where the court examined the full trial record. See also Harrington v. California, 395 U.S. 250, 254 (1969). Here the trial court did not proceed by analyzing the record; instead it applied a flat test for prejudice: Did the defendant in fact end up having another opportunity to bring the alleged error before the court? If so, he is never "prejudiced." The trial court's rule, in addition to serving no deterrent function, also seems to encourage repetitive and piece meal litigation.

3) "On or about April 8, 1974," Elliot Sagor -- the Assistant U.S. Attorney principally responsible for the Rosner new trial proceedings -- "came into possession of the Goe memorandum" (T. Tr. at 589) -- a document previously described, supra.

4) On April 9, 1974, Sagor discovered and read the Goe memorandum. He "realized right away that the Goe memorandum, if true, and if in government possession and known to the government at the time, was a document which should have been turned over to defense counsel at the time of trial" (H. Tr. at 593). Upon reading the Goe memorandum, he confronted Leuci with it. Leuci has testified that Sagor was extremely agitated and asked "what blank idiot knew about this and where has it been?" Leuci described Sagor as being "up to the third story by that time." And when Leuci incidentally acknowledged that the Goe episode had actually "happened", Sagor "continued going up" (H. Tr. at 97, 98).

5) On April 9, 1974 -- after reading the Goe memorandum and realizing that it was 3500 material -- Sagor submitted to the District Court the government's memorandum and affidavits in opposition to the defendant's new trial motion. He has acknowledged on the witness stand that he made a deliberate decision not to "mention" the Goe memorandum in the government's affidavit on April 9 . . ." He gives two reasons for having made this decision: "one, because it was not called for at that time . . . by the Lawrence allegations" (although the motion for a new trial was specifically premised on the claim that Leuci had committed crimes other than those he admitted to at the Rosner trial); and "two, my investigation was incomplete as to the validity of the Goe memorandum on that date" (H. Tr. at 593)

(although the memorandum contained not an allegation against Leuci, but rather an admission by him; moreover, this excuse does not explain why he did not "mention" the Goe memorandum after his investigation was completed several days later -- and why he waited more than three months, until after the Supreme Court had denied certiorari, before he mentioned the Goe memorandum either to defense counsel or to the Court).

6) In his affidavit of April 9 -- admittedly executed after he read the Leuci admission in the Goe memorandum -- Sagor made the following affirmative representation:

> "The United States Attorney's office has been able to receive through Mr. Taylor memoranda made of a 1969 investigation conducted by the Police Department and him of Leuci and others. Mr. Taylor advised your deponent that these allegations were never substantiated by the Police Department or himself and that his part of the investigation ended in 1970." (Emphasis added)

Failure to mention the Goe memorandum -- which did substantiate a Leuci crime -- in this context was particularly inexcusable, since the Goe memorandum was part of the material Taylor turned over to Sagor.

7) In April 1974, Leuci told Sagor about the existence of a recording of a conversation between Leuci and Lawrence surreptitiously made by Leuci in 1971. A transcript was then made and read by Sagor.

8) Some time in early April 1974, U.S. Attorney Curran met with Assistant U.S. Attorney John Gordon and asked him "what the legal effect would be of false testimony by a government witness on collateral matters in a criminal trial. . .." Mr. Gordon immediately asked what he regarded as the critical

question: "I asked him whether we were aware of the falsity of the testimony at the trial . . .." (H. Tr. at 728). Mr. Gordon has acknowledged that he advised Mr. Curran that "the government's knowledge" was "a critical factor" in determining whether a new trial would have to be granted (H. Tr. at 732).

9) In mid-April 1974, John Gordon -- the Assistant U.S. Attorney in charge of appeals-- read the Goe memorandum and discussed it with Sagor. Sagor told him the Goe memorandum constituted "3500 material which had not been turned over to Mr. Rosner at the time of trial . . ." (H. Tr. at 751). Gordon replied that "it was very unfortunate -- that we had not turned this thing over, and it was one in a succession of important cases where there had been a failure to turn over 3500 material" (H. Tr. at 752). Sagor also admits having discussed the Goe memorandum -- at various times -- with Assistant U.S. Attorneys Giulliani, Jaffe, Shaw, Scoppetta, Feinberg, Gleckel and "possibly more" (H. Tr. at 647-648). He also discussed it with U.S. Attorney Curran.

10) On April 17-18, 1974, Leuci began to admit having committed hundreds upon hundreds of crimes in addition to the four he admitted to at the Rosner trial.

11) Between April 17, 1974 and April 30, 1974, the United States Attorney's office did nothing to alert the Solicitor General's office to the fact that Leuci had admitted committing perjury at that trial. The government acknowledges that it had no intention of informing the Solicitor General's office of this crucial development, until it learned that the Solicitor General's brief contained matters inconsistent with the Leuci admissions (H. Tr. 745-746).

12) On April 23, 1974, the United States Attorney's office sent a secret ex parte letter to Judge Bauman stating, inter alia, the following:

> "This is to inform you that for the first time last week, Mr. Leuci told the government of certain criminal acts committed by him when he was a member of the Narcotics Division . . . about which Mr. Leuci did not testify at the trial of Edmund Rosner. I stress that none of this activity was or could have been known to the government then" (H. Tr. at 661-62). (Emphasis added)

It is now undisputed that the italicized portion of that letter was untrue, since Sagor had read the Goe memorandum 15 days prior to sending the letter: and the Goe memorandum establishes -- at the very least -- that various government officials knew of the Goe episode before trial and that the principal prosecutors "could have . . . known" about it by the exercise of minimal diligence. Moreover, the record establishes that one of the two chief prosecutors for purposes of 3500 material, Shaw, did in fact know about the episode, and the other, Scoppetta, knew about the Leuci-Lawrence drug taped conversation long before the trial, and had been informed about the Goe crime by Shaw. The U.S. Attorney's office asked that the letter to the trial court be sealed and be made part of the record. The trial judge did so, without even notifying defense counsel that he had received an ex parte communication from the government.

13) On or about April 23, 1974, the U.S. Attorney's office learned that the Solicitor General had submitted a reply in the Supreme Court to the Rosner certiorari petition one day after Leuci had admitted his perjury. Not aware of Leuci's recantations, the Solicitor General had made certain statements

in that reply that were inconsistent with the facts as they were known to the U.S. Attorney's office at that time.

14) On April 30, 1974, Mr. Gordon called Deputy Solicitor General Andrew Frey and informed him that Leuci had perjured himself at Rosner's trial by denying the commission of numerous crimes of which he had, in fact, been guilty. He also told Frey that the U.S. Attorney's office had had no knowledge of this prior to the Rosner trial. "I told him that the crimes that we discovered that Leuci had lied about had not been known to us at the time of Leuci's false testimony" (H. Tr. at 738). Although he admittedly knew about the Goe memorandum when he had this discussion with the Deputy Solicitor General, Gordon never mentioned to the Solicitor General that there was a memorandum in the government's files prior to Rosner's trial, containing an admission by Leuci that he had committed a crime that he had not disclosed at the Rosner trial.

15) On April 30, 1974, there was a meeting between U.S. Attorney Curran and Gordon. At this meeting a decision was made to tell the Solicitor General that it was the position of the United States Attorney's office that neither the Supreme Court nor defense counsel should be told about the Leuci admissions until the investigation was completed and the material presented to the Grand Jury (H. Tr. at 763, 767, 769).

16) At the time this decision was communicated to the Solicitor General the Rosner case was scheduled in the Supreme Court for an imminent conference and decision which would necessarily have occurred before the Leuci investigation was completed.

17) On May 1, 1974, Gordon called Frey and told him that a lawsuit was being filed by the New York Special Prosecutor that would publicly disclose the fact that Leuci had made certain admissions to the government. The U.S. Attorney's office, therefore, no longer had any objection to the Supreme Court's being apprised of this development.

18) On May 2, 1974, Rosner and his lawyers first learned about the Leuci admissions through a story in the New York Times.

19) On May 6, 1974, during argument on the Special Prosecutor's suit, Rosner's defense counsel made an application on behalf of Rosner, seeking disclosure of the Leuci statements so that they could be brought to the attention of the Supreme Court. Rosner's defense counsel informed the government and the court that the Supreme Court action on the petition was imminent. Rosner's defense counsel also informed the government that he would be relying in the case of Mesarosh v. United States, 352 U.S. 1 (1956), in which the Supreme Court itself ordered a new trial after the government informed it that an important witness may have testified falsely in other cases.

20) On May 7, 1974, the Solicitor General requested a postponement of the conference on the Rosner case and indicated that he would be filing a supplemental brief.

21) Several days later, the Solicitor General sent a telex draft of his proposed memorandum to Gordon and Sagor for their suggestions and corrections. Both Assistants made corrections which were communicated to the Solicitor General's office the next day.

22) Sagor admitted adding the following underlined words to the draft brief (H. Tr. at 812):

"It should be made only after hearing such new evidence as is available, including evidence bearing on petitioner's allegation that the government 'knew about Leuci's additional criminal conduct' which the U.S. Attorney denies and which is potentially critical to the disposition of the new trial motion." (Emphasis under Sagor's addition)

23) At the time Sagor inserted this statement he was fully aware of the existence of the Goe memorandum and of the fact that this memorandum had been in the Files of the federal government before Rosner's trial. There is nothing in the record to suggest that he was not also aware of the fact that then-Assistant U.S. Attorney Shaw -- who had developed the Rosner case -- knew before the Rosner trial that Leuci had admitted to the crime reflected in the Goe memorandum. Sagor was also aware of the existence of the March 1971 Leuci-Lawrence tape, and of Scoppetta's pre-trial knowledge of, and responsibility for, that tape. Thus, his written addition which stated that the "U.S. Attorney denies" that the government "knew about Leuci's additional criminal conduct" was false; at the time this addition was made, Sagor knew that the government was aware of some of Leuci's undisclosed criminality prior to the Rosner trial.

24) In the middle of May, 1974, the Solicitor General filed a supplemental memorandum in the Supreme Court which contained the following sentence: "It (the determination whether a new trial should be granted by the trial judge) should be made only after hearing such new evidence as is available, including evidence bearing on petitioner's allegations, which the U.S. Attorney denies, and which is potentially critical to the disposition of the new trial motion, that there was knowledge on

the part of or wrong-doing by the prosecutors in connection with false testimony by Leuci" (at 10) (Emphasis added). At the time this statement was made to the Supreme Court, it appears that no one in the Solicitor General's office was aware of the fact that the Goe memorandum had been in government files and known to Shaw before the Rosner trial; but both Sagor and Gordon knew about the Goe memorandum, and nothing in the record suggests that Sagor was unaware that Shaw knew about the Goe episode. Sagor also knew that the tape of Leuci's March 1971 criminal conversation with Lawrence was in the files of the U.S. Attorney's office -- and had been known to Assistant U.S. Attorney Scoppetta at the time of the Rosner trial.

25) On May 28, 1974 -- while the petition for certiorari was still pending before the Supreme Court -- Rosner filed a motion calling for the government to produce Leuci for an interview and to turn over certain documents bearing on Leuci's admitted criminality. This motion was explicitly premised on the need to bring information to the attention of the Supreme Court before it decided whether to grant a new trial under the principle articulated in the Mesarosh case. Both Sagor and Gordon were physically present during the argument and were fully familiar with the defendant's theory before the Supreme Court. At no time during the proceeding did they disclose, either to defense counsel or to the Court, that the government had possessed pretrial knowledge of the Goe episode and of the incriminating tape of March 1971.

26) On May 29, 1974, defense counsel brought a writ of mandamus in the Court of Appeals against the trial judge,

seeking disclosure of a letter summarizing Leuci's crimes. Sitting at counsel table for the government were both Gordon and Sagor. Neither Assistant mentioned the Goe episode, nor the incriminating tape.

27) On June 10, 1974, the Supreme Court denied Rosner's petition for a writ of certiorari.

28) In late June, 1974, the government finally disclosed the existence of the Goe memorandum to defense counsel -- after it was too late to bring to the attention of the Supreme Court.[57]

ARGUMENT

It cannot be disputed that the government's actions and inactions between April 8 and late June of 1974 fall well below the standard of disclosure required of the prosecution. All the arguments set forth in the previous section to support the appellant's claim relating to the Lawrence allegations are fully relevant here. Indeed, those arguments apply in spades to this extraordinary deliberate three-month cover-up. "(W)ith the benefit of the reflection that should attend the preparation of an (appeal), the prosecutor was content to allow (the Supreme Court) to appraise the issue on the basis of a false predicate" (Ott, supra, at 875).[58] The United States Attorney's office was successful in withholding from the Supreme Court the first

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[57] The Leuci-Baron tape and Scoppetta's knowledge of it were not disclosed until July 15 and 16, 1974, at the very close of the hearing on the new trial motion, when Leuci made an "inadvertent" reference to it. Even then, the government resisted its disclosure.

[58] Although the District Court stated that Leuci's "overall confession was brought to the attention of the Supreme Court,"

(footnote continued on following page)

conclusive evidence establishing that the government had pre-trial knowledge of crimes committed by Leuci which he denied on the witness stand. That is the critical significance of the Goe memorandum and of Shaw's and Scoppetta's pre-trial knowledge of the crime and of Scoppetta's pre-trial knowledge of the content of the Leuci-Lawrence tape. It is undisputed that the prosecutors were aware of the critical importance of whether the government had or did not have pre-trial knowledge. Assistant United States Attorney Gordon testified that he personally told U.S. Attorney Curran that pre-trial government knowledge was a "critical factor" in determining whether a new trial was warranted (H. Tr. at 732).

The District Court, in its opinion, completely misunderstood the significance of the Goe memorandum, Shaw's and Scoppetta's pre-trial knowledge of the crime, and Scoppetta's pre-trial knowledge of the tape. It concluded that:

> "The incident described in the Goe memorandum was trivial in comparison to the other crimes to which Leuci confessed. His overall confession was brought to the attention of the Supreme Court, and I therefore fail to see how the addition of a single minor item to the list of Leuci's sins could have produced a different result in that Court" (Slip Op. at 25).

But the Goe memorandum (and the Shaw and Scoppetta pre-trial knowledge) did not merely add "a single minor item to the list of Leuci's sins." It made it clear -- for the first time -- that (continued)

> the Solicitor General's supplemental brief stated merely that "recent developments suggest that the principal government witness committed perjury at the trial of this case as to collateral matters raised by the defense in an effort to impeach his credibility." A detailed review of Leuci's spectacular admissions was not included.

some of Leuci's sins were known to the United States Attorney's office before the Rosner trial and during Leuci's false testimony at that trial. This is a critical difference in kind rather than degree, as Gordon himself acknowledged in his testimony.

The government's deliberate, calculated, and sustained decision to keep this evidence of pre-trial knowledge from the Supreme Court -- while explicitly representing to that Court that "the U.S. Attorney denies knowledge on the part of . . . the prosecutors in connection with false testimony of Leuci" -- is, at the very least, in clear violation of the standards set forth in Berger, Mesarosh, and in the American Bar Association's Final Draft of the Proposed Code of Professional Responsibility and of its Standards for Criminal Justice, The Prosecution Function and the Defense Function. It is far worse than the distasteful situation in Ott, for which the Court found reversal to be the "required penalty."

The District Court denied a new trial because it could "see no prejudice to Rosner from the government's omission" since the Supreme Court "may well have another opportunity to pass on Rosner's contentions" (Rosner, supra, at p. 25). The District Court's narrowly focused inquiry misses the broad implications of failing to provide a remedy for the government's suppression of information. If the District Court's rule is adopted, the prosecution will suffer no meaningful sanction. It will be encouraged to continue to make omissions which it regards as "trivial", and no doubt its designation of what is "trivial" to the defense may be expanded considerably.[59] Here, the information

[59] See, United States v. Nixon, ___ U.S. ___ (1974).

suppressed by the government eventually became known. Disclosure may never be made in future cases, however, if the government is not effectively deterred by a reversal here.[60]

The only appropriate remedy for the government's misconduct in this case is for a new trial to be ordered. That is the remedy that defendant was seeking from the Supreme Court, and the only effective way of deterring the kind of misconduct engaged in by the government here is for that remedy to be ordered by this Court. Unless there is an effective sanction against failure to disclose such evidence on appeal, or pending certiorari, the government will have everything to gain -- and absolutely nothing to lose -- by always attempting to cover up and suppress evidence that it may have failed to discover pretrial and has discovered while review is pending.

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60 Appellant strongly suspects that there is yet more information which is still in the possession of the government. Under the lower court's theory there would be no effective remedy if it turns out that the government is still withholding evidence.

CONCLUSION

Each of the six grounds discussed in this brief -- standing alone -- requires a new trial. When considered together, they constitute a "totality of the circumstances" that leaves no doubt that the interests of justice demand a new trial. If the government's conduct in this case -- massive perjury, the use of a major criminal as its key witness, repeated suppression -- is to be ignored, then the "waters of justice" will indeed have been "polluted." Mesarosh v. United States, 352 U.S. 1 (1956).

Respectfully submitted,

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November 18, 1974

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